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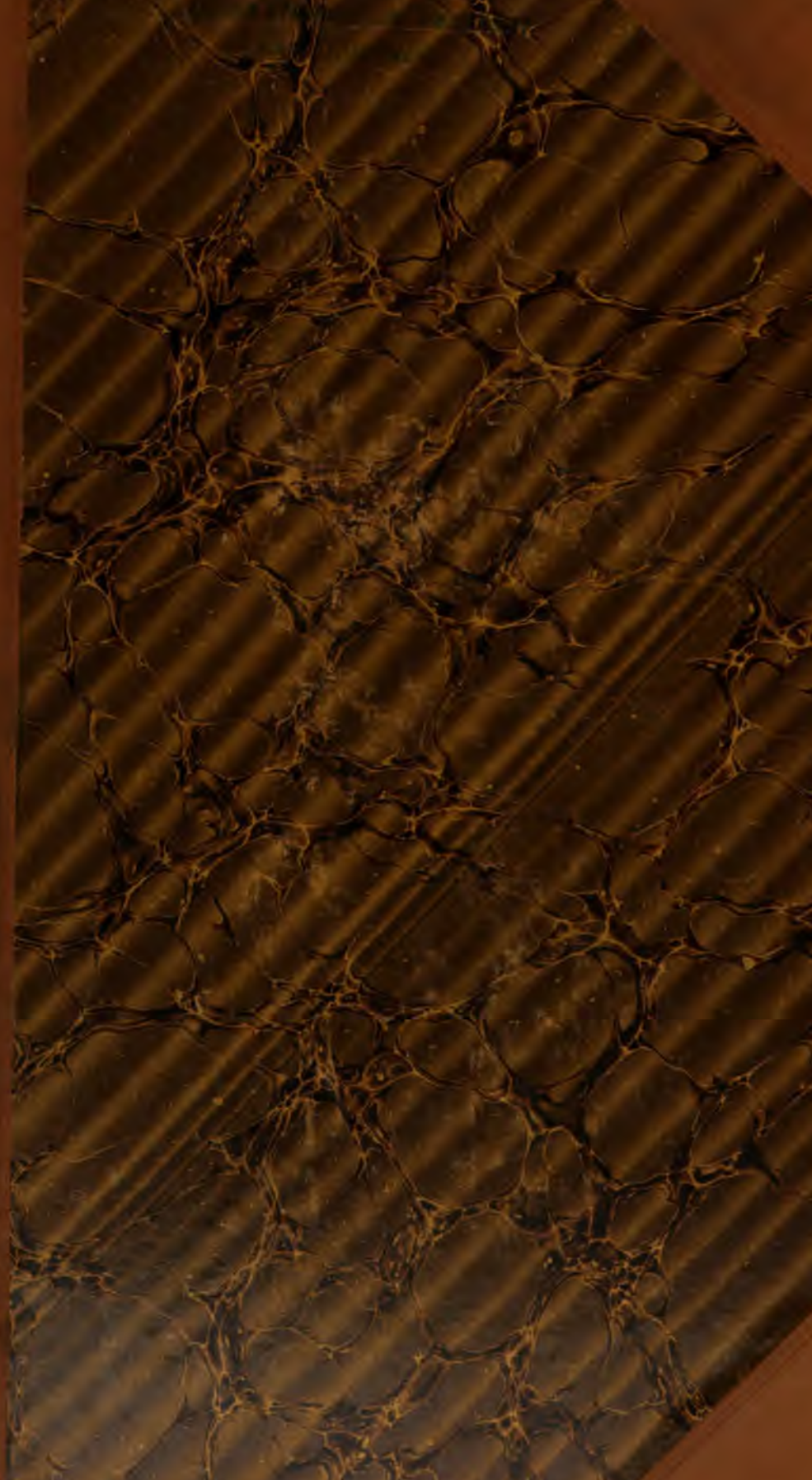
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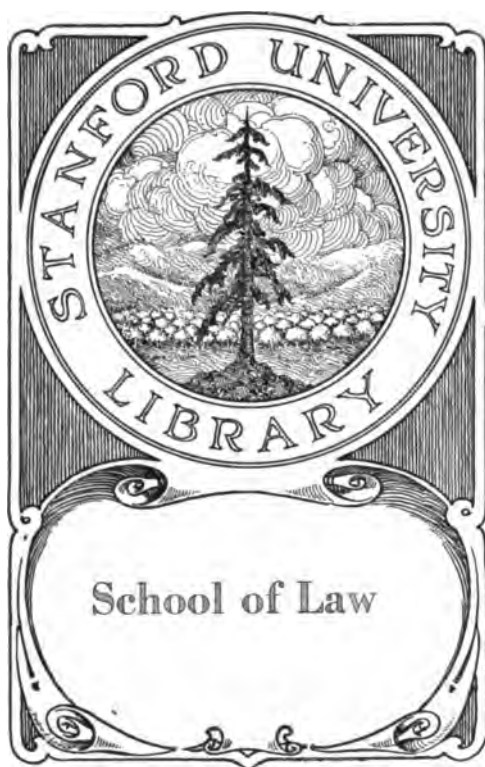
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No. I.

DIARY FOR JANUARY.

1. Tues.....*New Year's Day.*
4. Sun.....*2nd Sunday after Christmas.*
5. Mon.....Co. Ct. and Sur. Ct. Terms commence. Christmas vacation in Exchequer Court ends.
6. Tues.....Christmas vacation H. C. J. ends.
8. Thur.....Christmas vacation in Supreme Court ends.
10. Sat.....Co. Ct. and Sur. Ct. Terms end. Vacation Sup. Ct. ends.
12. Sun.....*1st Sunday after Epiphany.*
12. Mon.....Sir Charles Bagot Gov.-Gen., 1842.
13. Tues.....Prim. Ex. for Students and Articled Clerks begin. Court of Appeal sittings begin.

TORONTO, JANUARY 1, 1885.

THAT the English judges, much to their honour, do not hesitate to use very plain language towards practitioners when occasion calls for it, is illustrated by the remarks of Fry, L.J., in the newest *Lyell v. Kennedy* case, in the November number of the *Law Reports* for the Chancery Division. He says:—"I have rarely come across a case in which greater folly has been shown than that which has been manifested in the way in which this case has been conducted. There has been a competition of demerits on both sides; each has striven to use the practice and forms of the Court to the utmost for the purpose of aggravating and annoying the other, and they have each been successful to a considerable extent, and the result has been a most incredible waste of money, which will have ultimately to be borne by one or other, or both of the parties."

THE *American Law Review* has recommended its periodical ravings about Canada and its connection with England, with its usual remarks upon our "knee crooking," "dependence," "inferiority," etc. It is quite unnecessary to be perpetually saying

how much the Eagle wants to clasp the Beaver to its bosom. We know that already. The difficulty is that we do not want to be clasped. In truth, should that bubbling, fermenting and rapidly disintegrating conglomeration of discordant elements lying to the south of this great Dominion offer to annex themselves to Canada we should politely decline the honour. We, however, quite agree that Sir J. A. Macdonald is "one of the ablest of living statesmen," and it is quite evident that they want a man of his capacity to try and put things in order for them. They find it difficult to do it for themselves. We are told that "the highest offices within the gift of the Republic would be opened to Canadians. Americans would delight to honour themselves by making such a statesman as Sir John A. Macdonald their President; and the conservative influence of Canada in American politics would be very salutary." It would indeed. One cannot, however, touch pitch without being defiled, and so we think that after the political exhibition of our cousins during the late Presidential contest the less attention they draw to the subject the better.

THERE is overmuch truth in the following remarks clipped from the *Manitoba Law Journal* on the subject of Queen's Counsel, *à propos* of some recent appointments in that Province; and some of these appointments are relatively not quite so absurd as the last batch in Ontario:

"The practice of singling out, from time to time, certain barristers for invidious distinction, should have been abolished together with patents of monopoly—that is some centuries ago.

QUEEN'S COUNSEL—SOME PECULIARITIES IN THE LAW OF LIFE ASSURANCE.

"There are two grounds upon which these patents of precedence are supposed to be granted—political services and professional merit. Of the two, we think the former the less objectionable. Let it be understood that during Tory reign the Tory lawyers can, on application, obtain their silk, and when the Grits succeed to office that their friends shall succeed at the bar, and, all events, we have an intelligible system. But, if merit is to be the ground, who is to award the prize? It is safe to say that the Governor-General and his council are seldom, if ever, personally aware of the respective abilities of those who are in daily competition at the bar, and yet they are those who decide the question. If the matter were as easy of decision as a horse-race, by all means let there be an annual contest, and let the best man get his reward. But, in so doubtful a matter as legal ability, who can decide? What is the criterion? Is it success? That comes sometimes without learning. Is it learning? That may exist without success. Is it both learning and success? Then what degree of each? Twenty briefs at an assizes, with fifteen wins to five losses? There is no gauge, and from the leaders to the duffers the gradation is so sensible that there must always be great difference of opinion as to the proper order of merit. It will not do to let the judges make the selection—although they are the most competent to do it—for they must keep themselves free from the suspicion of favouritism. It would disturb the harmonious relations of the bar to place the matter in the hands of practitioners, or the Law Society. Practically those with influence at Ottawa dispense the patronage, and usually the list is absurd and indefensible.

"We object to the system because it gives one barrister a fictitious importance and dignity over his fellows. If nature has endowed him with greater ability or industry, that is no reason why the Government should add to his advantages, and if his inclinations are political rather than professional, he should look for political and not professional rewards.

"We object to the system also, because it is carried out at the expense of jealousy, ill-feeling and heart-burning, and because it subserves no useful purpose. What propriety is there in exalting one man and, in consequence, relatively depressing another? Till nature changes, favoured elevation will turn conceit into superciliousness, and slights will discourage and dishearten the most indomitable."

As the person responsible for the above was one of the recipients of the so-called honor he had the greater freedom in thus "swairing at lairge."

SOME PECULIARITIES IN THE LAW OF LIFE INSURANCE.

[Communicated.]

The Legislature during its last session passed an act consolidating and in many important respects amending the law securing to wives and children the benefit of life insurance, but in its over-anxiety to protect everybody and to make provision for all manner of cases which might arise has cast about the seventh section of the Act a cloud of uncertainty, and shrouded it with a degree of abstrusness that would render it difficult of construction even by the "Philadelphia lawyer" whose sagacity for construing knotty points has earned for him a degree of notoriety much to be envied by his less intelligent brethren.

The Act after making provision for the endorsing of policies (not originally taken out under the Act) in favour of the wife, or the wife and children of the insured, proceeds to deal with the question of making apportionments, and then declares:

"That where it is stated in the policy or declaration that the insurance is for the benefit of the wife and children generally, or of the children generally, without specifying the names of the children—the word *children* shall be held to mean all the children of the insured living at the maturity of the policy, whether by his then, or any other former wife, and the wife to benefit by the policy shall be the wife living at the maturity thereof."

Now this leaves little doubt as to the children—there has been a merciful and tender harked solicitude displayed by the legislators in providing for the issue of all the marriages, and the unfortunate insured can descend peacefully to his grave with the sweet assurance that his \$1,000 policy (or as the case may be) will at all events be divided equally among his surviving "olive branches," but it remains for that astute lawyer from the City of Brotherly

SOME PECULIARITIES IN THE LAW OF LIFE ASSURANCE—RECENT ENGLISH DECISIONS.

Love to say in the event of the insured having had two wives, and having made a declaration in favour of his (while the first wife was living) wife generally, without naming her, whether he can apportion her share after her death in favour of his children, or of his second wife. The very object of the statute seems to be to permit the insured, in the event of the death of all the beneficiaries during his own life, to re-apportion the shares, or deal otherwise with the policy, but in the case of a modern Blue Beard, it would seem that a trust is raised by the statute in favour of the wife who shall have the misfortune (or good fortune) to outlive her lord and master.

A distinction has been drawn between the case of a policy made for the benefit of (or subsequently endorsed in favour of) the wife alone though not specifically named, and a policy made in favour of "the wife and children," and the construction put upon same has been, I understand, that in the latter case the beneficiaries cannot be separated, and that the clause in question must be considered in connection with the whole section, and that therefore the literal construction must be put upon the words "That the wife (in a policy payable to wife and children) is the one who shall be alive when the policy becomes a claim," but that in the former case, as it is not a state of things contemplated by the section (that is not a wife in whose favour along with the children a trust is raised by the statute) the wife there, though not named, means the present or then wife, *i.e.*, the one living at the time the policy is taken out, or at the date of the declaration endorsed.

Such a construction can undoubtedly be placed upon the section in question, and is reasonable, though the last two lines of the section admit of a construction the other way, shewing very conclu-

sively the necessity for an amendment to the Act, and at all events demonstrating very emphatically how necessary and prudent it is for the party insured to be careful, when availing himself of the advantages of the Act, to name the wife he intends to benefit. It seems to me that it would be wiser to amend the law in such a way that in the event of the death of the party or parties intended to be benefitted, the insured might, as to such share or shares, be able to re-allot as he deemed proper.

RECENT ENGLISH DECISIONS.

The remaining number of the November *Law Reports* is a very small one, comprising 13 Q. B. D. p. 649-696, and 9 P. D. p. 181-217, and contains only two or three cases which it comes within the scheme of these articles to notice.

RAILWAYS—UNDUE PREFERENCE.

The first of these is the *Manchester, etc., Railway Co. v. The Denby Main Colliery Co.*, 11 Q. B. D., p. 674. Sec. 90 of the Railways Clauses Consolidation Act, 1845, provides (to the same effect as R. S. O. c. 165, sec. 23, sub-sec. 6) that tolls charged by railway companies for the carriage of goods shall be charged equally to all persons, and after the same rates in respect of all goods of the same description passing over the same portion of the line of railway, and that no reduction or advance in any such tolls shall be made either directly or indirectly, in favour of, or against any particular person using the railway. It appeared that the plaintiffs' railway charged one uniform set of rates per ton for the carriage of coal from about forty-eight different collieries to a number of specified places lying eastward of these collieries, and served by the plaintiffs' railway. The rates so charged were termed "group-rates." The consequence was that the coal from the collieries westernmost in the group were carried a

RECENT ENGLISH DECISIONS—OUR ENGLISH LETTER.

further distance for the same sum as that charged for coal from those further to the east. Pearson, J., held this a violation of sec. 90. He says, p. 678:—"We cannot adopt the narrow construction of sec. 90, contended for by the plaintiffs' counsel, namely, that it only applies [where the *termini* of the transit correspond. In the absence of special circumstances to justify the same charge for carrying a greater distance for one customer than for another, there would appear to be that kind of inequality which sec. 90 is intended to prevent. In such cases part of the services to the particular customer would practically be rendered gratuitously and to the disadvantage of others. We think, therefore, that sec. 90 applies."

TIME FOR MAKING AWARD—ENLARGEMENT BY THE COURT.

Next has to be briefly noticed *re May and Harcourt*, *ib.* p. 688, which decides, apparently for the first time, that where, by a written submission to arbitration, the time within which the award was to be made was fixed at one month, and the submission contained no power to enlarge the time, and the award was in fact made after the expiration of the month, the court nevertheless has power subsequently to the making of the award to enlarge the time under sec. 15 of the Common Law Procedure Act, 1854 (*cf.* R. S. O. c. 50, sec. 204). It is pointed out by Lord Coleridge, C. J., that in *Lord v. Lee*, L. R. 3 Q. B. 404, it had been held that where the submission fixes no limit, the statutory limit of three months may be extended by the court, though the application for an extension is not made till after the expiration of the three months and after the award has been made, and the decision here proceeds on the same principle.

REVOCATION OF PROBATE—COURT OF CHANCERY—JURISDICTION.

Lastly, *Priestman v. Thomas*, 9 P. D. 210, must be mentioned as authority for

saying that in England at all events, the Court of Chancery Division has no jurisdiction to revoke the probate of a will.

A. H. F. L.

OUR ENGLISH LETTER.

(From our own Correspondent.)

WE have just come to the end of a year of unprecedented depression, and this same depression of commerce has produced a terrible effect upon the fortunes of English lawyers. Traders have been exceptionally averse to litigation, and have rarely consented to put in an appearance at the law-courts, except under peremptory summons from the Bankruptcy Court. Yet even this Court has been comparatively idle, since, under the new *regime*, it affords relief neither to the debtor nor to the creditor, is ruinous to what the *Pall Mall Gazette* contemptuously describes as "bankruptcy practitioners," and provides no one with an income except a single Government office. Yet I am much mistaken if even the favoured servants of the Board of Trade, the fifty or sixty official receivers who were gloating a year ago over their success in obtaining what they hoped would prove lucrative appointments, have not found that, on the whole, the reality falls sadly short of the promise. The Bankruptcy Act was passed with the avowed intention of placing the management of insolvent estates in the hands of creditors to whom it was supposed that the official receiver would pay a certain amount of deference, but it has lately been demonstrated in Court, and creditors in general have long ago discovered, that their wishes were a matter of secondary importance. The result has been that private arrangements have become enormously common, so much so that an association has been formed with the view of obtaining statutory sanction for such arrangements. Now I am well aware that a gentleman,

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eminent enough to subscribe his name to an article, asserts that this is not the case; but it can only be said that, on the whole, the despised practitioners are likely to know more of the normal consequences of insolvency than the outside world, and that the practitioners are of the contrary opinion. In this letter I devote particular attention to this Act, because it is evident, from the attention given to the subject by a recent Canadian writer of the highest eminence, that the problem of bankruptcy is not much nearer to solution in the Dominion of Canada than it is in the Mother Country, and that there, as here, its supreme importance obtains due recognition. Further, the subject is one with which I am somewhat familiar, as an exponent, however, and not as a victim, having followed the present Act of Parliament from the beginning of its operation, and I believe that in such following is to be found the surest method of detecting faults and discovering merits. The chief faults have already been indicated, and there is only one bad one, which is that practitioners are underpaid, which is the worst kind of economy. Men are so constituted that they will not, as a general rule, work well unless they are paid well, and the intricacies of bankruptcy law are such that they cannot be mastered without careful study. Again the ordinary bankruptcy brief involves more labour in preparation and perusal than any other. Let any man ask himself whether it is easier to argue a reference in a large commercial dispute, or in the Bankruptcy Court, over interminable figures, and having done so let him assign, if he can, any reasonable principle upon which justice demands that the bankruptcy lawyer should be paid at a low rate. The very law which cuts down the practitioners' fees indirectly admits the difficulty of the subject-matter by assigning a special judge of the Queen's Bench Division to the de-

partment of bankruptcy. The Lord Chancellor, in exercising his discretion in choosing a judge for the work, selected Mr. Justice Cave, a judge notorious for conscientious industry and clearness of insight above any of his brethren of the Queen's Bench Division. Yet the work of the judge is certainly not as hard as that of the advocate. Let us pass, however, to the merits of the Act. Has it checked fraudulent bankruptcies? It has certainly decreased their number. Beyond this it has brought a good many fraudulent trustees to account and unearthed dividends which had been undistributed for many years. Also, it has done much good work in the relief of small debtors. But it is very severe. Here is a recent case: A trader failed for a large amount; his assets were small, and he was found guilty of "rash and hazardous speculation." In the result the judges of the Divisional Court in Bankruptcy, Matthew and Cave, J.J., ordered the debtor to file a yearly statement of his income and to pay over to the creditor's trustee everything above £400 a year until the whole debt was discharged. This was a case in which the debtor could not sell the goodwill of his business, which, as Mr. Justice Matthew vaguely phrased it, was entirely personal, but it cannot be said that it was lenient to compel the unfortunate man to carry on business for his creditors, as their manager, for an indefinite number of years, for this in fact is the result of the decision. There is no appeal against such an order as this. The judge may grant a man his discharge upon terms, and, so far as I am aware, there is no appeal except to the clemency of the judge who has imposed the terms. If so, and the point being undecided, it is proper to suggest doubt; the case is rather similar to that which often occurs on circuit when the junior inflicts an outrageous fine upon one of the members of the mess, against which decision there is no appeal except

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to the clemency of the junior, which is somewhat difficult to reach when the fine, in the shape of champagne, has disappeared down the throats of the mess.

The controversy concerning the Lord Chancellor's delay in appointing Queen's Counsel still continues, and is waxing impatient. He has now announced that no promotions will be made before Easter, at the earliest, and he is likely enough, when Easter comes, again to defer the evil day. Why a man should want to be promoted one hardly knows. Little work as there is for juniors, there is still less for silks, and it is all concentrated in a very few hands. Still the silk gown is the sign of an honourable dignity, and the desire to protect the Inner Bar is no reason for refusing a prized privilege to capable men. Besides, if the Inner Bar requires protection, the Outer Bar is entitled to equal consideration, and what would be the storm of popular indignation if the Benchers of the Inns of Court declined to call more men to the Bar until the numbers of their seniors were sensibly diminished. In brief, the logical consequence of limiting the numbers of Queen's Counsel must also be to limit the numbers of juniors.

Crowded courts have been the rule during the past term, and one doubts whether the crowd was densest over *Adams v. Coleridge*, *Finney v. Garmoyle*, or the *Mignonette* case. On the whole, however, the fair Mrs. Weldon has, from time to time, collected as many hearers as any other litigant. Her general appearance has been described on a former occasion, and it only remains to be said that she has registered a couple more victories of late. The *Lotinga* insurance case has recently been the subject of a lengthened and, it may be added, a remarkably disgusting trial. The practical point at issue was whether a deceased money-lender and bankrupt had been, at the time when he effected a life insurance, a person of strictly sober habits. An array

of witnesses on the one side swore that he was always drunk; an equal array declared that his sobriety was exemplary and remarkable. This conflict of testimony went on for something like a week, the witnesses being carefully kept out of court in the meantime. But, as the judge remarked, the precaution was futile, because the witnesses naturally read in the daily papers the account of the evidence which had been given on the preceding day. In fact, having regard to the abnormal and unnecessary length of our modern trials, there can be no question that this good old custom of the criminal courts has become a mere matter of form. By the way, the conclusion of the *Lotinga* case was not otherwise than instructive. Clearly the jury had nothing to do except to decide which of two armies of witnesses was committing perjury, and to give a verdict in harmony with the decision. But the jury entirely failed to agree, thereby passing a significant comment upon the character of the evidence submitted to them. In fact, it is not too much to say that there has been a phenomenal increase of perjury of recent years, and that, whatever Mr. Homersham Cox may say, the failing is not peculiar to Wales.

If one may be permitted to take a general survey of the talk among lawyers now-a-days, I should be inclined to say that it was strangely dull and monotonous. Bad times do not conduce to lively discussion, and such reforms as the Franchise Act and the Redistribution Bill are exciting enough to distract men from professional topics. A good many barristers will lose their seats, amongst them Mr. Warton, who has been known to appear in the courts. Mr. Charles Russell, Q.C., intends, so it is said, to stand for Holborn, though rumour originally assigned him to the Irish dock labourers in Liverpool. Mr. Edward Clarke, Q.C., will probably reappear as the representative of one of the minor

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RE BOLT AND IRON COMPANY.

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constituencies into which Southwark is doomed to be dissected. Also a host of lesser legal luminaries intend to seek Parliamentary honours for some of the lesser London constituencies, of which the names will sound strange. There will be a member for St. George's in the East, and one for Bethnal Green, one for Mile-End-Town, and so on. In the present Parliament there are at least a hundred barristers, and in the next more may be expected. As for forthcoming topics there are none in prospect, except the proposal to amalgamate the professions, which is far from realization and, for the present at least, quite visionary, and the assize system, which will be discussed in about a fortnight's time with the usual acerbity.

Temple, Dec. 23rd, 1884.

CANADA REPORTS.

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(Reported for the CANADA LAW JOURNAL.)

RE BOLT AND IRON CO.

HOVENDEN'S CASE.

Winding up Insolvent Company—Allotment of stock—Proceedings against contributory—Costs.

Under an order for winding up an Insolvent company under 45 Vic. c. 23 D., the proceedings to enforce the liability of contributories must be taken by the liquidator, and not by the petitioner for the winding-up order.

When proceedings are so taken by the liquidator and are unsuccessful, costs may be awarded against the liquidator personally, leaving him to apply to be allowed such costs against the assets of the company.

A contract between a company and a person who makes application for shares must be dealt with as ordinary contracts: there must be an offer by the one to take shares, and an acceptance of such offer by the company, or something by words or conduct which shows that the offer has been accepted.

One H. subscribed for shares in a company but no shares were formally allotted to him by the directors. Calls were made by the general manager, and notices of such calls were sent by the secretary to, and received by H., but the calls had never been authorized by the board of directors.

Held, that the unauthorized acts of the officers named could not be construed to be an allotment, or a notification of an allotment of stock so as to bind the company or prove an acceptance of H's. subscription for stock.

A board of directors cannot delegate to its officers or to third parties its statutory powers to allot stock, or make calls.

[Mr. Hodgins Q. C.—Oct. 18.]

This was a reference under the Dominion Insolvent Companies Act of 1882.

Laidlaw, for liquidator and petitioner.

Lash, Q. C., for Hovenden.

THE MASTER IN ORDINARY—In proceeding to wind up the business of this company a list of parties alleged to be contributories is brought in, and application is now made to have one R. J. Hovenden declared to be a shareholder in the company, and liable as a contributory in respect of \$1,000 worth of shares subscribed for by him in the capital stock of the company.

There is evidence of a subscription under a power-of-attorney given by Hovenden to one Moodie, a director in the company. There is also some evidence which tends to show a revocation of the power prior to the subscription by Moodie, but the evidence is not pressed. No evidence has been given of any allotment of stock to Hovenden by the board of directors, or of any notification of allotment. The liquidator relies upon certain notices of calls received by Hovenden subsequent to his subscription, which it is contended establish a *prima facie* case of allotment of stock. These alleged calls, it appears, were made by the general manager of the company, and were notified by the secretary, without any authority or warrant from any resolution, by-law or other act of the board of directors.

The statute R. S. O. c. 150 authorizes the directors (s. 29) to make by-laws to regulate the allotment of stock, and the making of calls thereon; and provides (s. 34) that if the letters patent of the company make no definite provision, the stock of the company, so far as it is not allotted by the letters patent, shall be allotted when and as the directors by by-law or otherwise ordain.

The letters patent make no provision regulating the allotment of stock, and no by-laws have been proved before me.

In *Pellatt's case* L. R. 2 Ch. App. 527, Lord Cairns L. J., held that where an individual applies for shares in a company, there being no obligation to let him have any, there must be a response by the company, otherwise there is no contract. And in *Gunn's case* L. R. 3 Ch. App. 40 Sir John Rolt L. J., held that the contract between a company and a person who makes application to become a member must be dealt with according to the principles which apply to ordinary contracts, there

must be the consent of the two parties to the contract: an offer by one, and an acceptance by the other, or something which satisfies the Court either by words or conduct that the offer has been accepted to the knowledge of the person who made the offer.

There is no evidence that the directors had authority to delegate, or in fact did delegate to the officers named the statutory powers vested in them to allot stock and to make calls. Unless expressly authorized, directors cannot delegate to third parties their power of allotting shares, or of making calls. Under a similar power, a board of directors passed a resolution delegating the allotment of shares "to the discretion of the manager and the two private directors." The court held that the board had no such power, that the maxim *delegatus non potest delegari* applied, and that an allotment made by these delegates was not binding: *Howard's case*, L. R. 1 Ch. App. 561.

In this case I cannot, therefore, hold that the unauthorized act of the general manager in making calls; nor the act of the secretary in notifying this party of such unauthorized calls was such an allotment or notification of an allotment of stock as would bind the company or make this party a shareholder.

A question has been raised whether these proceedings to enforce, the liability of the shareholders should have been taken by the liquidator or by the petitioner.

The English and Canadian Acts are substantially the same as to the powers of the liquidator, (Imp. Act 25-26, Vict. c. 89, ss. 94-5; 45 Vict. c. 23, ss. 33-5, D.) And it would appear from *re Duckworth*, L. R. 2 Ch. App. 578, approved in *Waterhouse v. Jamieson*, L. R. 22 H. L. Sc. 29, that in winding up proceedings the liquidator represents the creditors only because he represents the company, and that through the company so represented, the rights of the creditors are to be enforced. Other cases show that proceedings against contributories are taken by the liquidator by his name of office on behalf of the company, and not by the petitioner on whose application the winding up order is made.

The statute (s. 34) directs the liquidator to take into his custody all the property, effects and choses in action to which the company is entitled; and (s. 35) to bring suits in his own name as liquidator or in the name or on behalf of the company. The proceedings to enforce the liability of contributories must therefore be taken by the liquidator and not by the petitioner.

Having found that Hovenden is not a contributory, the proceedings against him must be dismissed with costs, which I award against the liquidator

personally, leaving him to apply in respect of the same against the assets of the company as he may be advised: *Ferrar's case*, L. R. 9 Ch. App. 355. A similar rule applies in insolvency proceedings: *Ex parte Angerstein*, L. R. 9 Ch. App. 479.

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QUEEN'S BENCH DIVISION.

BROWN V. NELSON.

Statute of Frauds—Contract not to be performed within a year—Part performance—Rescission.

The plaintiff agreed to purchase from the defendant seventy-six shares of stock in the Globe Printing Company, and gave to the defendant his note, payable in two years, for the price of the shares, which were transferred to him. At the defendant's request he then pledged these seventy-six shares, and, as the jury found, lent the defendant forty-four other shares of his own, to pledge to a bank, which discounted the note for the defendant.

The jury also found that it was a condition of the purchase that the defendant, who had a large interest in the Globe Printing Company, should keep the plaintiff in the position which he occupied as managing director of the Globe Printing Company, at a fixed salary. The defendant at the maturity of the note retired it and took an assignment to himself of the one hundred and twenty shares.

The plaintiff having been afterwards dismissed from his position as managing director, brought this action for a return of the forty-four shares, on the ground that the purpose for which they had been pledged, viz.: the raising of money by the defendant for George Brown's estate, had been fulfilled; and for a return of the note, and to be relieved from the purchase of the seventy-six shares, on the ground that the condition of the purchase, viz.: his being retained in office, had not been fulfilled, but had been broken by the defendant procuring his dismissal.

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Held, that as there had been a partial performance of the defendant's agreement, by retaining the plaintiff in office for the period within which the seventy-six shares were to have been paid for, there could be no rescission of the whole contract : that the plaintiff—the finding of the jury as to the forty-four shares not having been moved against—was entitled to a return of these shares, and the defendant to judgment for the price of the seventy-six shares; and that the plaintiff's remedy, if any, for wrongful dismissal was by an independent action.

Held, also, that the defendant having performed his portion of the agreement, the Statute of Frauds, as regards agreements not to be performed within a year, was not applicable to the undertaking to keep the plaintiff in office.

Osler, Q.C., and *Nesbitt* for plaintiff.

Robinson, Q.C., and *Biggar*, contra.

REGINA V. BUNTING.

Ontario Judicature Act—Constitution of Courts—Criminal proceedings—Removal of indictment by certiorari—Practice.

An indictment was found against the defendants in the High Court of Justice at its sittings of Oyer and Terminer and gaol delivery, and, on being called upon to plead, the defendants demurred to the indictment. A writ of *certiorari* was subsequently obtained by the defendants, in obedience to which the indictment, demurrer and joinder were removed to the Queen's Bench Division. Upon the return the Crown took out a side-bar rule for a consilium, and the demurrer was set down for argument. A motion was made by the defendants to set aside the proceedings of the Crown on the ground that they should have been called upon to appear and plead *de novo* in this Division.

Held, WILSON, C. J., dissenting, that the Court of Assize of Oyer and Terminer and of general gaol delivery is now by virtue of the Judicature Act the High Court of Justice; that the indictment was found, and the defendant appeared and demurred thereto in the High Court of Justice; and that it was not necessary to plead *de novo* to the indictment.

Per ARMOUR, J., and O'CONNOR, J.,—The

Supreme Court of Judicature is not properly a Court, and ought more properly to have been called the Supreme Council of Judicature. The Divisions of the High Court are not themselves Courts, but together constitute the High Court, which is thus divided for the convenience of transacting business; and the judges sit as judges of the High Court, and exercise the jurisdiction and administer the functions of the High Court.

The recognizance entered into by the defendants on the removal of the proceedings to this Division, provided that they should "appear in this Court and answer and comply with any judgment which may be given upon or in reference to a certain indictment, or upon or in reference to the demurrer to such indictment, and plead to said indictment if so required."

Per WILSON, C. J., *semble*.—That the practice and procedure before the Judicature Act should be maintained in its entirety, though possibly it might be varied by agreement. By the recognizance the defendants had not agreed to vary it; but they might thereunder elect to appear and answer to the indictment, or to appear and argue the demurrer; and they, being ready to appear and answer the indictment, would fully perform the condition of the recognizance by so doing.

Irving, Q.C., and *Bethune*, Q.C., for the Crown.

McCarthy, Q.C., *Richards*, Q.C., and *W. A. Foster*, contra.

REGINA V. JAMIESON.

Lottery Act—Giving prizes for guessing number of buttons in glass jar—Quashing conviction—Costs.

The defendant placed in his shop window a globular glass jar, securely sealed, containing a number of buttons of different sizes. He offered to the person who should guess the number nearest to the number of buttons in the jar a pony and cart, which he exhibited in his window, stipulating that the successful one should buy a certain amount of his goods.

Held, that as the approximation of the number of buttons depended upon the exercise of judgment, observation and mental effort, this was not a "mode of chance" for the disposal of property within the meaning of the Act.

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Quære, whether defendant should not get the costs of quashing conviction, made to test the law in such a case.

COMMON PLEAS DIVISION.

Rose, J.]

[Dec. 3.]

THE CORPORATION OF STRATFORD V. WILSON.

Municipal Corporations—Agreement with officer to account for fees received outside of his office—Validity.

The plaintiffs appointed the defendant chief of police of the Town of Stratford at a named salary, but that he should account for, and pay over to the plaintiffs, all fees received by him from the county as a reward for services performed by him as a county constable.

Held, that under the 5th and 6th Ed. VI. ch. 16, and subsequent acts in force in this Province, the agreement to account for such fees was invalid.

Woods and Smith, for the plaintiffs.

Idington, Q.C., for the defendant.

Rose, J.]

[Dec. 9.]

MACDONELL V. ROBINSON.

Libel—Defence, sufficiency of—Demurrer.

Action against the defendant for a libel on the plaintiff published in a newspaper called *The Week*. The defence set up was that the plaintiff had for some time prior to the alleged defamatory publication addressed open letters to the public through the medium of the public press, and had invited public attention to his (the plaintiff's) character and position as a solicitor and barrister, and had challenged public criticism upon his conduct in connection with the subject-matters referred to in the said article, and such criticism invited by the plaintiff had been made, and had been made in various newspaper articles and letters and correspondence, from time to time, immediately prior to the said article, and such article was a moderate expression of opinion thereupon and in no way damnified the plaintiff as a barrister and solicitor. And the defendant further said that the alleged libel and words were and formed part of an article printed and published in the

said newspaper called *The Week*, and which said article was a fair and *bona fide* comment upon a public matter of public and general interest, and it was printed and published *bona fide* and for the benefit of the public, and not otherwise, and without any malicious intent or motive whatever.

Held, if true, a good defence, and the learned judge could not say on the pleadings that it was untrue.

W. Nesbitt, for the plaintiff.

Falconbridge, for the defendant.

Full Court.]

[Dec. 20.]

FLETCHER V. NOBLE.

Promissory notes—Consideration.

In an action on four promissory notes, made by the defendant, H., payable to the plaintiff, the defendants set up that the notes were given for the purchase of the plaintiff's interest in certain homestead lands in the State of Michigan, H. being the purchaser and defendant, N. surety; that under the laws of Michigan only persons of twenty-one years of age could hold homestead lands, and that plaintiff was under that age. There was no representation by plaintiff that he was of such age, while the fact was as much within the knowledge of H. as of the plaintiff. H. also obtained a surrender from the plaintiff of his interest in the land, whereby he was enabled to have himself located in his stead, which he otherwise might have had difficulty in doing, and got the same he would have got if plaintiff had been of full age.

Held, that there could not be said to be no consideration for the notes, and the plaintiff was therefore held entitled to recover.

G. T. Blackstock, for the plaintiff.

Osler, Q.C., for the defendant.

HAYES V. ARMSTRONG.

Provincial election—Returning officer—Refusal to delay return after notice of recount—Evidence of—Person aggrieved—Jurisdiction to make order.

Action by the plaintiff, a defeated candidate at an election for the local legislature against the defendant, the returning officer, for wilfully

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contravening the provisions of R. S. O. ch. 10, sec. 125 in not delaying his return after receiving notice from the county judge of a recount of the ballots.

The learned judge at the trial *held* that the plaintiff was a person aggrieved within the meaning of sec. 181 of the act; that the defendant could not question the power of the county judge to give the appointment or issue the notice on the material before him, because the process of the Court or judge must be obeyed while it stands when as here there was jurisdiction, but he also held, which was affirmed by the full Court, CAMERON, C.J. *dubitante*, that this evidence did not show that the notice of the recount came to the knowledge of the defendant before he made his returns, and therefore he did not wilfully contravene the section; and the plaintiff therefore could not recover. .

Per CAMERON, C.J. The doubt in his mind arose from the defendant not affirming by his oath that the fact of a recount did not come to his knowledge before he made his return.

Lount, Q. C., for the plaintiff.

Aylesworth, contra.

HUGHES V. HAND IN HAND ASSURANCE COMPANY.

Insurance—Reference to arbitration—Costs of arbitration and award—Construction of order.

After the action had been commenced on a policy of assurance containing the statutory conditions, the defendants gave notice of arbitration under the condition in that behalf, when the Court made the following order: "And the Counsel for the defendants agreeing thereto and abandoning all defence to this action and admitting their liability under the policy sued on, it is ordered that all proceedings in this action be stayed, the plaintiff to be at liberty to sign judgment and proceed in this action for amount as may be awarded to him by the arbitrator or arbitrators now or hereafter to be appointed between the parties under the policies of insurance sued on in this action, and the statutory condition therein in that behalf, together with the costs of this action, etc. And it is further ordered without the consent of the defendants that either

party be at liberty, after the making of said award, to apply to a judge in Chambers in respect of the payment of the costs of the reference and award."

On motion to Rose, J., an order was made directing the defendants to pay the costs of the reference and award.

On appeal to the Divisional Court, CAMERON, C.J., was of opinion that the appeal should be allowed, and GALT, J., that it should be dismissed. The Court being equally divided the judgment was affirmed and appeal dismissed.

G. H. Watson, for the plaintiff.

Foster and J. B. Clarke, contra.

WARD V. HUGHES.

Assignment of chose on action—Absolute in firm though interest retained by assignor—Action by whom—Failure of consideration—Evidence of.

An assignment of a mortgage on land was absolute in form, though as a matter of fact the assignors retained an interest in himself.

Held, Rose, J., *dubitante* that an action on the covenant in the mortgage must be brought in the name of the assignee.

At the trial the learned judge dismissed the action on the ground that there was a total failure of consideration for the said mortgage. The Divisional Court was not satisfied that there had been such failure of consideration, and granted a new trial, with leave to have such parties added as might be deemed necessary.

George Bell, for the plaintiff.

The defendant in *pesso* contra.

PORTEOUS V. MUIR.

Promissory notes—Parol evidence—Suspension of time of payment.

To an action on a promissory note, payable on demand, the defendant set up a parol agreement whereby the payment of the note was to be suspended for two years; and *per* GALT, J., even if such evidence were admissible it showed that the agreement never came into effect, because one of the conditions upon which agreement was to take place was not complied with.

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Held, that evidence of such parol agreement was not admissible.

H. P. O'Connor, for the plaintiff.

Moss, Q.C., for the defendant.

WEBSTER V. STAGGART.

Award—Misconduct of arbitrator—What constitutes.

Held, that the improper reception or rejection of evidence does not amount to legal misconduct on the part of the arbitrator so as to entitle the award to be impeached.

Milligan (of Brampton) for the plaintiff.

Osler, Q.C., and *Justin* (of Brampton) contra.

GREEN V. PONTON.

Registrar—Omitting to enter instrument on index—Evidence—Who entitled to recover.

Action against a registrar for omitting to enter on the abstract index as to a certain lot, the will of one M. which had been registered, whereby it was alleged that the plaintiff was damaged in purchasing a mortgage on the lot. The mortgage was first purchased by S., a solicitor, who searched the title and subsequently assigned to the plaintiff. S. though accustomed to act for the plaintiff in investing his moneys, was in purchasing the mortgage dealing for himself. The plaintiff never authorized S. to search the title for him, and it was not searched when the assignment took place to the plaintiff.

Held, that the evidence shewed that S. when he purchased was fully aware of the existence of the will, and relied on the fact, as he thought that the mortgagor had acquired a title by possession.

Held, also, that under the circumstances no benefit could be claimed in this suit of the search made by S.

Osler, Q.C., for plaintiff.

Dickson, Q.C. and *Ponton*, contra.

HALL MANUFACTURING CO. V. HAZLITT.

Sale of goods—Property passing—Landlord and tenant—Right to remove tenant fixtures after expiration of term.

On 5th July, 1882, the plaintiff sold four Leffell double turbine wheels to U. & Co.

under a written agreement that the title and property therein should not pass until the whole purchase money was paid; but merely the right to possession should pass to them, which should be forfeited on default of payment or on the goods being seized under distress or execution, the sale being conditional, and punctual payment being essential to it. The wheels were received by U. & Co., and were placed in a flume attached to a pulp and paper mill erected by them on land with water privilege, occupied under a written agreement for a lease made with H. & Co., the agreement providing that the lease was to contain provisions for forfeiture in the event of bankruptcy or nonpayment of rent or non-performance of covenants. A lease was drawn up but was never executed. The wheels were placed in the flume so as to be capable of being taken out by the removal of a few boards and the expenditure of a few dollars. In February, 1883, the sheriff under an execution against goods seized the chattel property but not the wheels; and about the same time U. & Co. gave the key of the premises to H. & H. and voluntarily gave up possession to them, and in March following U. & Co.'s interest in, amongst other things, the wheels was sold to S. under proceedings to realize the amount of certain mechanics' liens. All the property of U. & Co. became vested in the defendants, the Ontario Pulp Co., who acquired the interests of H. & H. and S. U. & Co. made default in their payments to the plaintiffs, who in January demanded the wheels which the defendants refused to deliver up, claiming them as their property. In an action to recover amount due for said wheels,

Held, under the circumstances that the plaintiff was entitled to recover.

Ritchie, for the plaintiffs.

Osler, Q.C., for the defendants.

HORNER V. MERNER.

Agreement—Collateral verbal promise—Quantum meruit—Parties' minds ad idem.

The plaintiff in November, 1883, was engaged by A. M. as foreman of his brewery under an agreement, as he alleged, that he was to take charge of the brewery and make two brewings, and if they turned out well he was

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NOTES OF CANADIAN CASES.

[Com. Pleas

to be paid the same wages as one B. got, which appeared to be \$75 a month; that the brewings did turn out well, and he became entitled to the wages; that he continued working for A. M. for the wages until 21st June, when owing to financial troubles A. M. left leaving plaintiff's wages unpaid, and A. M.'s father, S. M., who was a large creditor, took charge of the business, and, as plaintiff alleged, verbally promised that if plaintiff would continue he would not only pay him his wages for the past, but for the future, and that plaintiff remained on these terms until August 21st, when he was discharged. Both A. M. and S. M. denied the agreement as alleged by plaintiff. The jury found that the agreement was as claimed by the plaintiff, and a verdict was entered against A. M. on this basis for the time prior to his departure, and against S. M. for such time and also for the subsequent period.

Held, that in any event there could be no recovery as to the time prior to A. M.'s departure, because the alleged promise was merely collateral and should have been in writing, and as to the subsequent period the evidence showed that the plaintiff could only recover on a *quantum meruit*, and he had been so paid; and that as to A. M. the evidence was most conflicting, and would lead to the conclusion that the minds of the parties had never been *ad idem*; and therefore the recovery should have only been on a *quantum meruit*; and that unless plaintiff would consent to reduce his verdict to an amount ascertained on such basis, there must be a new trial.

John King, for the plaintiff.

Osler, Q.C., for defendant.

MCKENZIE V. McLAUGHLIN.

License—Right to revoke—Estoppel—Parol evidence.

The plaintiff, by a lease under seal, leased to the defendant a shop, save and except the bottom portion of the east window, and save and except a portion of the shop described by metes and bounds. The defendant urged that prior to his accepting the lease and entering into the consideration for such acceptance, an independent and collateral parol agreement, separate and distinct, and not made part of

the written agreement, was entered into, whereby the defendant was to have permission or license to remove certain rough shelving, etc., and to fit up the shop, including the portion reserved by the plaintiff, with handsome and ornamental show-cases during the continuance of the term, so as to give the shop a uniform appearance for the defendant's benefit; and that in pursuance of such agreement, and with plaintiff's consent, the show-cases were put in.

Held, that the evidence of such agreement was not admissible as adding to the written agreement; but even if admissible it failed to establish the agreement; but, even assuming it to be proved, if it amounted to an easement or grant of an incorporeal right it should have been under seal, and not being under seal the license would be merely a parol license not incidental to a valid grant, and therefore revocable; and the fact of its being, as alleged, for a sum certain could make no defence; and also that the plaintiff was not estopped by his conduct from denying the defendant's right to retain the show-cases.

McCarthy, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

Osler, J.]

RE BELL TELEPHONE CO. ET AL. V. THE MINISTER OF AGRICULTURE.

Patent Act, 1870—Court, constitution of—Dominion Parliament—Ultra vires—Power of Minister.

Sec. 28 of the Patent Act, 1872, after providing for certain cases in which patents are to be null and void, continues: "Provided, always, that in case disputes should arise as to whether a patent has or has not become null and void under the provisions of this section, such disputes shall be settled by the Minister of Agriculture or his Deputy, whose decision shall be final."

Held, that a court or judicial tribunal for the determination of the matters referred to in the section was constituted by the Act; and that the constitution of such a court was not *ultra vires* of the Dominion Parliament as infringing upon subjects of exclusive Provincial legislation; and also that it was competent for the Minister to decide as to the existence of disputes arising for his decision.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Osler, J.]

GARDINER v. KLEOPFER.

Assignment for creditors—Assent of creditor.

After the execution of a deed of assignment in trust for creditors, the assignee called a meeting of the creditors, at which the defendant, a creditor, attended and assented to a resolution appointing him one of the trustees to aid the assignee in winding up the estate, and a resolution was also passed to pay certain arrears of wages; and he examined and reported on the amount and condition of the stock. A few days afterwards he brought an action on his claim against the debtors, recovered judgment by default and issued execution, and then attacked the deed.

Held, that the defendant must be deemed to have assented, and was estopped from denying its validity.

CHANCERY DIVISION.

Full Court]

WRIGHT v. LEYS.

[Sept. 5.]

Assignment of mortgage—Purchase in trust for mortgagee—Statute of frauds—Notice.

The plaintiff, who was mortgagee of certain lands, alleged that L, the present holder of the mortgage, purchased it from C with knowledge of the fact that C had purchased it from the original mortgagee as trustee for the plaintiff, who was to be allowed to redeem on paying such sum as C should pay for the mortgage and a certain additional sum for C's services.

Held, that the above agreement fell within the statute of frauds, and should be evidenced in writing.

Held, also, that even if this were not so, L could not be affected by the said agreement, having purchased without notice of it.

D. B. Read, Q.C., and W. Read, for the appellant.

Boyd, C.]

[November 19.]

McCARTER v. McCARTER.

Liability of executors for estate moneys received by solicitor—Negligence.

A B and C, three executors under a will, sold certain real estate of the testator. C,

who was entitled to the annual income of the proceeds, took the most active part in the management of the estate, as the others lived at a distance, and employed a solicitor who received two sums—\$980 and \$1,580—part of the proceeds of said sale, the former in January, 1876, and the latter in February, 1882. Both the other executors were aware of his employment and that these sums were in his hands. In February, 1884, the solicitor absconded, causing a loss to the estate of \$1,960, the balance then in his hands. In the will there was a clause "that each (of the executors) should be responsible for his or her acts only, and irresponsible for any loss unless through wilful neglect or default."

Held, that all three were equally liable, and must make good the amount to the estate.

Laidlaw for the plaintiff.

G. H. Watson, Ermatinger and Teetzel for the defendants.

Boyd, C.]

[Dec. 17.]

STOBART v. GUARDHOUSE.

Will—Devise—Child—Life estate—Estate in fee.

T. S., after providing for his widow in his will, made the following devise:—"And I give and devise to my nephew, R. S., Lot No. 30, in the Second Con. said Township of Etobicoke, during the term of his natural life (excepting he have a child or children) if not, at the expiration of his life to go to my daughter Ann Guardhouse or her heirs or . . ." The will also contained a residuary devise in favour of the testator's widow. R. S. took possession, married, had children, and died, leaving his widow and several children him surviving.

In an action by the widow of T. S., claiming that R. S. was only entitled to a life estate in the lot, and that she was entitled to it in fee under the residuary clause, it was

Held, following *Lethicullieur v. Tracy*, 3 Atk. 796, that an estate in fee may, by implication, be vested in the child, and that, by applying the rule in *Bisfield's* case (acted upon in *Doe dem Jones v. Davies*, 4 B. and Ad. 55), and reading "child or children" as *nomen collectivum* created an estate tail in R. S., that "child" under the circumstances was not a *designatio personæ*, but

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

comprehended a class, and that the plaintiff must fail.

W. Mortimer Clarke, for the plaintiff.

McMichael, Q.C., and *A. Hoskin*, Q.C., for the adult defendants.

J. Hoskin, Q.C., for the infant defendants.

Full Court.]

[Dec. 18.]

HAMMILL V. HAMMILL.

Will—Construction—Effects.

Decision of *PROUDFOOT*, J., which is fully noted, *supra*, vol. 20, p. 192, affirmed.

Per *BOVD*, C.—The rules of construction laid down in *Smyth v. Smyth*, 8 Ch. D. 561, which *PROUDFOOT*, J., followed, and the interpretation there given to the word "effects," are, without going into more recondite law, sufficient to support the judgment now under review. The earlier authorities, now to be treated as overruled, influenced by a canon of construction then deemed sacred, leaned strongly against the disherison of the heir, whereas the latter decisions proceed upon a contrary principle, and lean strongly against any construction that involves intestacy.

C. Moss, Q.C., for the appeal.

J. MacLennan, Q.C., contra.

Full Court.]

[Dec. 18.]

LONDON AND CANADIAN CO. V. WALLACE.

Will—Construction—Direction to carry on testator's business—Power to mortgage.

Decision of *FERGUSON*, J., noted, *supra*, vol. 20, p. 130, reversed, and the usual mortgage judgment pronounced.

BOVD, C.—The testator charges all his estate with the payment of debts. . . . As I read the evidence, it is quite insufficient to affect the company, through their agent, with notice that the money advanced on the mortgage in question was not to be applied in conformity with the provisions of the will. To my mind, that disposes of the whole action. In *re Tanqueray*, 20 Ch. D. 482, the law is thus expounded by *BRETT*, L. J.—"Wherever a testator devises all his real estate to his executors and directs them to pay his debts, the debts are charged on the real estate, whatever may be the trusts declared of that real estate, unless upon the

whole will, you can clearly find a contrary intention." That case also decides that such a delay as occurred in this case after the death, that is six years, raises no presumption that all his debts have been paid. The purchaser is not bound to inquire upon this matter, unless there has been a delay of twenty years. Within that limit, when there is a charge of debts with an implied power to sell or mortgage, and the purchaser gets the legal estate, he is protected in equity, whether there are debts or not, unless he has knowledge that there are no such debts. As I construe the will, I find no contrary intention clearly expressed therein. . .

PROUDFOOT, J.— . . I think the evidence fails to establish notice to Mr. Ward (agent of the plaintiffs) of the misapplication of the money, and the only notice suggested is that to him. The case is then brought entirely within the principle of *Ewart v. Gordon*, 13 Qr. 40, which was itself based upon that of *McLeod v. Drummond*, 17 Ves. 717. In other respects I agree in the opinion expressed by the Chancellor.

F. Arnoldi, for the plaintiffs (appellants).

C. Moss, Q.C., contra.

Full Court.]

[Dec. 18.]

FERGUSON V. FERGUSON ET AL.

Action impeaching a conveyance of land to M., the wife of K., on the ground that the land was really bought with K.'s money, and was so bought and conveyed to M. at K.'s direction, with the intent of delaying and hindering the plaintiff and other creditors of K.

There appeared no evidence of fraudulent intent connected with the conveyance to M. Moreover, it also appeared that the plaintiff was himself consulted with regard to the matter, and, knowing all the circumstances of K.'s financial position, he expressed his approval of what was done. He was not then a creditor of K., and did not become so till over a year afterwards.

Held, under these circumstances, affirming the decision of *FERGUSON*, J., that the plaintiff could not have the deed set aside as a fraud upon him.

C. Moss, Q.C., and *Hudspeth*, Q.C., for the plaintiff (appellant).

McIntyre, contra.

NOTES OF RECENT CASES IN MANITOBA.

NOTES OF RECENT CASES IN
MANITOBA.

FROM MANITOBA LAW REPORTS.

*Tax sale—Irregularities—Foreign Corporation—
Banking business.*

A foreign corporation loaned money on mortgage in this Province. The mortgage was executed in the foreign country and the advances made there. The corporation had no license to do business in Manitoba,

Held, that the mortgage was valid and vested the land in the corporation.

The plaintiff corporation had for its purposes "The investment of capital on the security of real estate, personal property, assets and obligations," and was prohibited from engaging "in the business of banking." The plaintiff corporation made loans to L. & Co., taking notes from which the interest was deduced in advance. D. a member of the firm of L. & Co. made a mortgage to the plaintiff corporation to secure payment of the moneys so advanced.—*Farmer's and Trader's Loan Co. v Conklin*.

Suit in equity—Power to garnish.

Held,—Affirming the order of the Referee, that under Con. Stat. c. 37, s. 78, the Court has power to issue garnishing or attaching orders in equity suits.—*Cameron v. McIlroy*.

*Action for non-delivery of goods—Condition indorsed
on shipping bill—Liability of carrier.*

In action brought for the non-delivery of sawn lumber delivered to defendants at P. to be carried by them to B., defendants pleaded a condition indorsed on the shipping bill, as follows: "That the company will not be responsible for any deficiency in weight or measure of grain, in bags or in bulk, nor for loss or deficiency in the weight, number or measure of lumber, coal or iron of any kind carried by the car load."

The evidence shewed that the lumber was loaded at P. and that a portion of it was not delivered at B. There was no evidence as to how the loss occurred.

Held, 1. That by the statute 42 Vict. c. 9, s. 25, s.-s. 4, the defendants were precluded from setting up the indorsed condition when a loss is charged as happening through their own negligence.

2. That in the absence of evidence, the non-delivery might be assumed to have risen from

misdelivery to some other person, or from the actual use of the property by the defendants for their own purposes, in which cases the condition would be no protection.—*Henry v. Canadian Pacific Railway Co.*

*Married woman—Liability on contract—Separate
estate.*

In an action brought to recover from the defendant, a married woman, the balance of an account for goods sold and delivered to her,

Held, that in the present state of the law, debts contracted by a married woman in carrying on a business or employment, occupation or trade, on her own behalf or separately from her husband, may be sued for as if she were an unmarried woman, that is without regard to separate estate.—*Wishart v. McManus*.

Fraudulent conveyance—Exemption from seizure.

Defendant, J. S., took up a quarter section as a homestead, performed settlement duties, and obtained a patent. He then made a conveyance to J. R., and J. R. conveyed to M. S., the wife of defendant J. S. Subsequently to these conveyances, plaintiff obtained judgments at law against the defendant J. S. The conveyances were without consideration. J. S. had no other property. Within three months after the execution of the conveyances, executions to the amount of \$1,388.38, against J. S. were placed in the sheriff's hands.

Held, 1. That the conveyances must be set aside, and equitable execution decreed.

2. That it is not necessary that the debts should have become payable before the fraudulent disposal of the property was made.

3. Exemptions from execution under Con. Stat. Man. c. 37, s. 85, s.-s. 8, as amended by 47 Vict., c. 16, s. 6, discussed.—*Brimstone v. Smith*.

Equitable assignment—Notice.

Held, by the full court, affirming the decision of Taylor, J., that an equitable assignment of a chose in action may be made by any words or acts shewing a clear intention to assign; a deed or writing is not necessary.—*McMaster v. Canada Paper Co.*

*Extradition—Habeas corpus—Form of taking
evidence.*

Where prisoner was charged with an extraditable crime and the evidence was taken down in

NOTES OF RECENT CASES IN MANITOBA—LAW STUDENTS' DEPARTMENT.

the narrative form in the judge's notes, and by way of question and answer by a shorthand reporter which were afterwards extended by the reporter but were not read over to the witnesses or signed by them.

Held,—Upon *habeas corpus* that there was no evidence—that is no evidence that the Court could look at—as proof of the alleged crime.—*Re G. A. Stanbro*.

Corporation—Contract under seal—Hire of servant or employé.

Plaintiff, a civil engineer, was engaged by defendants as provisional engineer at \$300 per month. The employment commenced on 9th of August, 1882, he was dismissed on 16th of December, 1883 and paid up to that date: He sued for wrongful dismissal and claimed wages up to the 9th of February, the earliest period at which his service could have been terminated by a month's notice.

Held, that as the plaintiff was an important official, his engagement was not binding upon the corporation, not being under its corporate seal.—*Armstrong v. Portage, Westbourne, etc., Railway Co.*

Railway Company—Loss of baggage—Warehousemen.

Held,—1. A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, etc., even when these are packed with the baggage for which they are liable.

2. When goods remain at the station at which a passenger alights but it does not appear that the Railway Company has charged, or is entitled to charge, for storage the Company is not liable as warehousemen.—*McCaffrey v. The Canadian Pacific Railway Co.*

Proceedings before the Legislature—Taxation of costs—Practice.

Held, that where a solicitor has obtained from the Speaker of the Legislative Assembly authority to act in any matter as a parliamentary agent, he can recover the amount due him for services, without being obliged to observe all the requirements of the English Act.—*Kennedy v. Austin*.

LAW STUDENTS' DEPARTMENT.

LAW SOCIETY.

EXAMINATION PAPERS.

FOR CALL;

Real Property and Wills.

1. What is the law as to the liability of a purchaser on covenants on his part contained in a deed not executed by him?

2. To what covenants is a purchaser entitled on a conveyance to him?

3. When is an abstract said to be perfect?

4. What is meant by (1) showing a good title, (2) making a good title?

5. Will a general devise of lands pass to the devisee the benefit of mortgages held by the testator? Explain.

6. Land is devised to A. for life, and after his decease to his heirs and the heirs female of their bodies. Construe this devise.

7. Are copies of deeds admissible in evidence under any circumstances on the trial of an action to recover land?

8. With what formalities must a will be executed under our present law?

9. A. having been in undisturbed possession of and for more than ten years, quits possession temporarily, and the person having the paper title gets in and holds possession. Would you advise an action to recover the land by A.? Give reasons for your opinion.

10. What is meant by a "satisfactory" title in a contract of sale?

Equity.

1. Speaking of specific performance it is said that "courts of equity will let in the defendant to defend himself by evidence to resist a decree where the plaintiff would not always be permitted to establish his case by like evidence." Illustrate this passage by an example.

2. In what cases will time be treated in equity as being of the essence of the contract?

3. State shortly the extent of the jurisdiction of the courts of equity apart from any jurisdiction conferred by legislative enactment to entertain interpleader actions, and state why it was that they would not usually entertain such an action by a sheriff in respect of goods seized by him in execution.

4. Give a state of facts showing a case where a court of equity would, apart from statutory enact-

LAW STUDENTS' DEPARTMENT.

ment, interpose by injunction to restrain the use of a trade mark, and state the ground on which such injunctions are granted.

5. What distinction is observed by courts of equity between their modes of construing executory trusts contained in marriage articles and those contained in wills?

6. A mortgagee having no power of sale in his mortgage foreclosed the mortgaged property and sold and conveyed a portion thereof; he then became convinced that the balance of his claim could not be realized from the balance of the property and he brought action against the mortgagor upon the covenant for payment contained in the mortgage seeking recovery of the balance of his claim, or of such deficiency as might arise after a sale of the balance of the property which action was defended by the mortgagor. Who should succeed in the action, and why?

7. Under what circumstances may a debtor revoke a general assignment made by him to a trustee for the benefit of his creditors?

8. Distinguish between the validity of an assignment of a pension granted for past services, and an assignment of the future emoluments of a public officer, and state the grounds for such distinction.

9. Lands are devised under the will of A. to B. in trust to raise money on the security thereof, for the purpose of complying with certain directions in the will. B., in pursuance of the provisions of the will, mortgages the said lands by an instrument in which he is described as trustee under the will of A., and in which he enters into the ordinary mortgage covenants. Default having been made in payment, the mortgagee seeks to recover payment of the mortgage moneys from B. personally. B. defends, on the ground that by his covenant he intended to bind and did bind the trust estate only. Who should succeed? Give reasons.

10. A. is the manufacturer of a certain medicine not protected by patent. His servant wrongfully discovers the process by which he compounds the same, and for value imparts the secret to B., who is aware of the manner in which the servant became possessed thereof. B. manufactures and sells the medicine in question. Has A. any, and if so what, remedy?

EXAMINATION FOR CERTIFICATE OF FITNESS.

Smith on Contracts and Benjamin on Sales.

1. Is an infant liable; (a) on an account stated when the account consists of the price of necessities; (b) on a promissory note given by him for the price of necessities; (c) for money lent to him for the purpose of enabling him to purchase necessities, and which he has used for that purpose?

2. A written agreement is made between two persons by which one is to serve the other for six months from date, performing the duties, and receiving the wages therein specified. On the following day they agree verbally that some of the duties specified in the writing are to be omitted, and others not specified are to be performed in-

stead thereof. On the trial of an action for breach of the written agreement, will parol evidence be admitted to prove that it was varied by the subsequent verbal agreement? Give reasons.

3. A resident of Ontario purchases goods in Buffalo from a merchant of that city, and then smuggles them into Ontario, the vendor being aware at the time of sale of the purchaser's intention to smuggle. Can the vendor recover the price of the goods in an Ontario Court? Will it make any difference, if the vendor pack the goods in a particular way, so as to assist the purchaser in smuggling them? Give reasons.

4. Is the receipt of goods by a carrier an *acceptance* and *actual receipt*, or either of them, by the purchaser within the meaning of the 17th section of the Statute of Frauds? Why?

5. Can a vendor who keeps possession of goods by virtue of his lien for unpaid purchase money recover from the purchaser storage, or other charges, for the time he so keeps them? Why?

6. Will a letter merely proposing to sell goods on the terms therein specified constitute a sufficient memorandum of a bargain within the Statute of Frauds? If so, when?

7. State briefly when a vendor will, and when he will not, be deprived of the right of *stoppage in transitu* by having taken a bill or note for the price of the goods.

8. After goods have been delivered to the vendee on a credit sale, the vendor, not receiving the price at the time agreed on, tortiously retakes the goods. What are the respective rights and remedies of the parties under these circumstances?

9. What difference does it make, as to the right of the vendor to recover the price of goods sold from the vendee, whether the property in the goods has passed to the vendee or not?

10. Give examples of *executed* and *executory considerations* respectively, and state what is the essential requisite of the former, as distinguished from the latter, in simple contracts.

A NEW VOLUME.—With the first number in January *Littell's Living Age* begins its one hundred and sixty-fourth volume. The ablest minds of the time are more than ever finding expression in foreign periodical literature, and the best of this literature is presented by *The Living Age* with a satisfactory completeness nowhere else attempted. The value to its readers of this standard magazine is therefore constantly increasing.

The first weekly number of the new year has the following table of contents:—English Songs Ancient and Modern, *Nineteenth Century*; The Liberal Movement in English Literature, *National Review*; The Home Life of a Court Lady, *Temple Bar*; Wurzburg and Vienna, *Contemporary Review*; Borrowdale of Borrowdale, *Macmillan*; At Any Cost, *Sunday Magazine*; Style and Miss Austen, *Macmillan*; The Archbishop of Dublin, *London Times*; etc., with the usual amount of choice poetry. This, the first number of the new volume, is a good one with which to begin a subscription. For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publisher offers to send any one of the American \$4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Dunroon McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James MacLennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougald.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885.
- Arithmetic.
 - Euclid, Bb. I., II., and III.
 - English Grammar and Composition.
 - English History—Queen Anne to George III.
 - Modern Geography—North America and Europe.
 - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- 1884.
- Cicero, Cato Major.
 - Virgil, Æneid, B. V., vv. 1-361.
 - Ovid, Fasti, B. I., vv. 1-300.
 - Xenophon, Anabasis, B. II.
 - Homer, Iliad, B. IV.
- 1885.
- Xenophon, Anabasis, B. V.
 - Homer, Iliad, B. IV.
 - Cicero, Cato Major.
 - Virgil, Æneid, B. I., vv. 1-304.
 - Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

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ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

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No. 2.

DIARY FOR JANUARY.

- 15. Thur.....Graduates seeking admission to Law Society to present papers.
- 17. Sat.....Last day for producing papers before admission as Solicitors.
- 18. Sun.....2nd Sunday after Epiphany.
- 20. Tues.....First Intermediate Examination.
- 22. Thur.....Second Intermediate Examination.
- 23. Fri.....Sir F. B. Head Lieut. Governor U. C., 1836.
- 25. Sun.....3rd Sunday after Epiphany.
- 27. Tues.....Solicitors' Examination.
- 28. Wed.....Barristers' Examination.
- 31. Sat.....Lord Elgin Governor-General, 1847.

TORONTO, JANUARY 15, 1885.

It would certainly be a very great convenience at Osgoode Hall if there were a telephone office upstairs. The constant necessity of going down to the entrance hall whenever one is "Wanted at the telephone," to use the familiar phrase of the despotic small boy whose summons one is so frequently called upon to obey, or whenever one wants to play the same trick on some one at the other end of the wires, is a great waste of time, strength and patience. Surely the funds of the Law Society could stand the expense of an office upstairs as well as one downstairs, and we certainly think any bencher who took the matter up would be a benefactor, not only of his own species, but also of the humble frequenters of the building, who have so long borne what otherwise one would be apt to call a most intolerable nuisance.

THOSE of our readers who are suffering from a plethora of brain matter may gain relief by trying to follow Lord Cairns in the windings of his "circular" arguments in the recent case of *Bowen v. Lewis*, 9

App. Cas., at p. 906. A testator devised his real estate to T. during the term of his natural life, and after his decease to his children, and if T. died without issue, then the question was, what estate did T. take under the will? Lord Cairns, after indicating his own view, observes that those who had arrived at a different conclusion to himself seemed to him to have done so by a process "very like the process of a circular argument." He then states the argument as follows:—

"The word 'estate' carries the fee simple, and therefore when you have the gift of an 'estate' to 'children' in this will, it must mean a gift to the children in fee simple; because it is a gift to the children in fee simple, *ergo*, the word 'children' cannot be a *nomen collectivum*, because the gift to the children is not a gift to them as a *nomen collectivum*; *ergo*, the gift over upon dying without issue must mean not generally dying without issue, but dying without the children mentioned before. Now, I might illustrate the fallacy of this by a circular argument in the opposite direction. If I begin at the other end you will have quite as good a circular argument backwards. Here is a gift over on death without issue. That means on the failure of issue generally. Therefore, when you go back and find that preceded by a gift to 'children,' in order to make the two consistent the word 'children' there must be a *nomen collectivum*, and must mean issue; and because you have a gift to children as a *nomen collectivum*, that is to issue, *ergo*, they cannot take as purchasers in fee simple, but must take an estate tail. It seems to me that the circular argument is just as good in the one direction as in the other, if you proceed upon the principle of putting a construction upon one clause without looking at the will as a whole."

MARRIED WOMEN'S PROPERTY ACT.

MARRIED WOMEN.

IN the case of *Re March Mander v. Harris* 51 L. T. N. S. 380, the English Court of Appeal reversed the decision of Chitty, J. (24 Ch. D. 222). The case involved the effect of the Married Women's Property Act, 1882, upon the construction of a will, whereby the testator devised to a man and his wife and a third person certain property. Chitty, J. had determined that the effect of the Married Women's Property Act, 1882, was to work an abrogation of the ancient rule of construction, whereby the husband and wife were regarded in law as but one person, and would, therefore, take a moiety, the third person taking the other moiety; and that now by virtue of the Married Women's Property Act, 1882, the parties severally take under such a devise one-third each. The Court of Appeal however held that the will, having been made in 1880, was not affected by the Married Women's Property Act, 1882, subsequently passed, notwithstanding that the testator did not die until 1883, after that Act came into operation. The Court of Appeal, however, was careful to guard itself against being in any way committed to any opinion as to what would be the judgment of the Court in such a case if the will were made after the Married Women's Property Act, 1882, took effect. This case follows in principle *Jones v. Ogle* L. R. 8 Chy. 192, in which it was laid down that the construction of a will is not affected by a statute passed subsequent to its date, even though the testator may not die until after the statute takes effect. But in neither *Jones v. Ogle*, nor yet in *Re March*, does the Court appear to have considered how far such a ruling is consistent with the 24th section of the Wills' Act (see R. S. O. c. 106 s. 26), which expressly declares that every will shall be construed with reference to the real and personalestate comprised in it, to speak and

take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. It might be argued that the testator must be presumed to make his will with reference to the state of the law at the time the will bears date; but on the other hand it may be said that a testator is to be presumed to know the law, and if any Act is passed affecting the construction of a will previously made by him, and he does not choose to alter it, he should be presumed to have adopted the alteration in its construction effected by any subsequently passed statute. At all events we think this exception which the Court of Appeal appears to have engrafted on the 24th section of the Wills Act should at least have been justified by some reference to the latter Act, which, however, is not referred to in either case either by Court or counsel. Possibly the question may to some extent be affected by the rule laid down by the Court of Appeal in *Ex parte Walton* 17 Ch. D. 756, and adopted by the House of Lords in *Hill v. East and West India Dock Company* 9 App. Ca. 448 (noted vol. 20, p. 315), to the effect that when a statute enacts that a certain state of facts shall be deemed to exist, which do not in fact exist, that the purpose for which that fiction is converted into fact is to be ascertained by the Court and the statute making the fiction a legal fact is to be confined to that particular purpose. We believe the purpose for which the clause in the Wills Act, to which we have referred, was passed was, primarily, to prevent intestacy as to lands acquired after the making of a will; the words, however, of the statute appear quite wide enough to warrant the construction that every will is to be construed according to the state of the law existing at the time of the testator's death, even though it may have been varied by statute between the making of the will and the death of the testator.

THE CHANCERY DIVISION.

THE CHANCERY DIVISION.

It has been for sometime past apparent, that notwithstanding that the various Divisions of the High Court of Justice have, in all civil proceedings, equal and co-ordinate jurisdiction, and that theoretically the same kind of law is to be administered in each Division of the High Court; yet, for some reason or other, there has been a manifest tendency on the part of a majority of suitors to prefer bringing their actions in the Chancery Division. Why this should be so, it is not very easy to explain. Theoretically the relief given would be just the same in the Queen's Bench Division, as in the Chancery Division, in like cases, and yet practically it might prove to be something very different. For instance, in cases where equitable relief is sought, on the one hand you have a Bench which is familiar with the principles of equity jurisprudence, and on the other you have in the Queen's Bench and Common Pleas Divisions a Bench, which, without being disrespectful, may be characterized as not quite so familiar with that branch of law. This fact may have much to do with the preference of suitors for bringing actions in which equitable relief is sought in the Chancery Division. But this does not by any means afford a complete explanation of the reason of the excess of business in the Chancery Division; for many actions for purely legal demands have been brought in that Division for the trial of which it cannot be for a moment pretended that the judges of the Chancery Division have any special aptitude, not equally enjoyed by their brethren in the other Divisions.

We believe that the cause of the apparent superior popularity of the Chancery Division is, in a great measure, attributable to the fact, that the class of business formerly exclusively cognizable in the Court of Chancery exceeded in volume that transacted in either of the other

Courts, and this class of business naturally gravitates now to the Chancery Division, although, as we have said, it is theoretically precisely the same kind of tribunal as the other two Divisions, and exercises precisely the same jurisdiction, and has the same code of practice, and the same tariff of costs. This arises from the habit practitioners have acquired of transacting their business before certain judges and officers who are familiar with the class of cases formerly brought exclusively in Chancery, and this natural preference of solicitors for doing business before men familiar with the work required to be done, rather than before those who, in some cases, are but novices and without experience, is not to be wondered at. It is a fact which was perhaps not sufficiently taken into consideration by the Legislature, when it endeavoured, by merely changing the name of the Court without altering its *personnel*, to make business flow in unaccustomed channels.

In order to check the flow of business into the Chancery Division, or rather to equalize the flow of business into all the Divisions, a Rule has been recently passed by the Supreme Court, requiring writs to be issued alternately from all the Divisions. It remains to be seen whether this will have the effect intended. The expedient of issuing writs alternately, is not, by any means, an absolute check upon suitors selecting their own forum. The device of issuing writs in fictitious suits, in order to bring an action in a particular Division, has been resorted to in the past, and will no doubt be resorted to again, whenever the solicitor deems it desirable to sacrifice a dollar or two, in order to bring an action in any particular Division.

Preparatory to passing the Rule referred to, returns were procured from the various officers who issued writs; these returns we believe show that since the Judicature Act came into force up to the 1st December

THE CHANCERY DIVISION.

last, the number of writs issued from the different Divisions have been as follows:—

	Q.B.	C.B.	Chy.	Excess in Chy.
1881.....	676	662	982	306
1882.....	1979	1958	2694	715
1883.....	2283	2284	2833	549
1884.....	2027	2015	2774	747
	<u>6965</u>	<u>6919</u>	<u>9283</u>	<u>2317</u>

It will thus be seen, that the excess of business in the Chancery Division over that in either of the other Divisions, has, in three years and a-half, amounted in the aggregate to 2,317 actions. In addition to actions commenced by writ, there are also to be added a large number of actions for partition and administration, commenced by notice of motion, and which have usually been prosecuted in the Chancery Division, and of which no account is taken in the returns referred to. Thus with the same staff of judges, and about the same staff of officers, as the other Divisions, the Chancery Division has, according to these figures, been doing at least one-third more work, during the past three years and a-half.

We believe London is the only city in the Province, in which the writs issued in the Chancery Division, have not largely exceeded those issued in either of the other Divisions, during the past year. For instance, it appears that at the following places, the writs issued were as follows:—

	Q.B.	C.P.	Chy.
Brantford	39	39	49
Ottawa	46	47	153
Kingston	26	25	96
Belleville	66	64	171
St. Catharines	43	44	54
Guelph	35	35	103
Hamilton	126	126	234
While in London the figures were	252	252	137

The reason for this singular preference of Middlesex suitors for the Queen's Bench and Common Pleas Divisions, we are at a loss to conjecture.

Assuming that the effect of the new Rule will be to equalize the number of cases in the various Divisions, we may be sure of this, that it will inevitably lead to

the transfer of a great many actions from one Division to another. All actions commenced in the Chancery Division required to be tried by a jury will have to be transferred, according to the practice established, to what is called very erroneously a "Common Law Division," because the Chancery Division has no machinery for trying actions by jury. Then again we expect it will be found necessary to transfer from the so-called "Common Law Divisions" to the Chancery Division many actions in which equitable questions arise—because the judges of the so-called "Common Law Divisions" prefer not to try them. If carried to any great extent, the practice of transferring actions will be found to be fraught with not a few inconveniences, and have a tendency to induce mistakes in the conduct of proceedings, and may possibly create difficulties in the way of tracing up proceedings, after the lapse of a few years.

This practice of transferring actions, for any such reasons as we have mentioned, seems opposed to the intention of the Judicature Act. That Act assumes that each Division shall be competent to try every action that is brought in it. It virtually declares that a specific performance action is not one for the exclusive consideration of the Chancery Division, neither are actions for assault and battery, or libel, or seduction, peculiarly within the province of the so-called "Common Law Divisions," and yet every time an action of assault and battery is transferred from the Chancery Division to the Queen's Bench Division, or a specific performance action from the Queen's Bench Division to the Chancery Division, the principle of the Act appears to be violated. The only cause of transfer the Act seems to recognize is the equalization of business in the different Divisions. When an action in the Chancery Division is required to be tried by a jury, instead of

RECENT ENGLISH DECISIONS.

the action being transferred, it would, we think, be far better if the practice authorized a suitor to enter his case for trial at the assizes as a matter of course. In the same way if a suitor desires an action commenced in the Queen's Bench Division in which any equitable relief is sought, to be tried before a judge of the Chancery Division, we do not see why he should not be at liberty to enter his action for trial at the special sittings appointed for the trial of actions in the Chancery Division.

At present the suitor has fewer facilities for the trial of actions than he had before the Judicature Act. Formerly actions in the Queen's Bench, or Common Pleas, triable before a judge without a jury might be entered for trial, as of course, at the Chancery Sittings. Now the judges at assizes refuse to try Chancery Division cases, and the judges at Chancery Sittings refuse to try Queen's Bench and Common Pleas actions. What is wanted is more reciprocity in this respect. And if any one Division becomes overburdened, there ought to be some means of securing with greater facility than appears at present to exist, the assistance of the judges of other Divisions.

RECENT ENGLISH DECISIONS.

THE December numbers of the *Law Reports* comprise 9 App. Cas. pp. 757 to 976; 27 Ch. D. pp. 361 to 712; 13 Q.B.D. pp. 693 to 878; 9 P.D. pp. 217 to 256.

BUILDING SOCIETY—BORROWING POWERS—OVERDRAWING BANKERS' ACCOUNT.

In the first of these there are only two cases which requires special mention here. The first is *Brooks and Co. v. the Blackburn, etc., Building Society*, p. 857. Here the points decided to which it seems desirable to call attention were that overdrawing a bank account is borrowing, and a Building Society, which has by its charter no borrowing power, has no power to over-

draw its banking account, and if its bankers, knowing the limited nature of the powers of the Society, permit it to overdraw its account, they cannot take the place of creditors of the Society in respect of such overdrafts. Lord Blackburn says, at p. 864: "The respondents, who are bankers, agreed to open an account with the trustees. In all banking accounts the bankers, so long as the balance of the account is in favour of the customer, are bound to pay cheques properly drawn, and are justified, without any inquiry as to the purpose for which these cheques were drawn, in paying them. But they are under no obligation to honour cheques which exceed the amount of the balance; or, in other words, to allow the customer to overdraw. Bankers generally do accommodate their customers by allowing such overdrafts to some extent. When they do so the legal effect is that they lend the surplus to the customers, and if the person drawing the cheque is authorized to borrow in this way on account of the customers, the bankers can charge the amount against those customers and their principals, and can make available any securities which, either from the general custom of bankers or from a special bargain, they have to secure their account. . . . It was argued that overdrawing a bank account, or, as it was called, taking advantage of banking facilities, was not like other kinds of borrowing, and two decisions of Stuart, V.C., in *re Cefu Cilcen Mining Company*, 7 Eq. 88, and *Waterloo v. Sharp*, 8 Eq. 501, were cited as authorities for that. I am not sure that I quite understand how far the Vice-Chancellor meant to go, but if he did mean this in any sense that would affect the present case I cannot agree with him.

. . . If it could be shown that the course of business authorized by the rules was such as to give, as incidental to it, a power to borrow, it would be authorized, though not expressly authorized. I do not think

RECENT ENGLISH DECISIONS.

it can be said that it is necessarily incident to the business described by the rules that there should be a power to borrow." Before dismissing the case it should be stated that the Court of Appeal had held that, the Society having deposited certain deeds with the bank to be held as security for the balance from time to time, the bankers, though not able to hold these deeds as securities for the overdrafts, were able to hold them as a security for repayment of so much of the moneys advanced by them as was applied by the Society in payment of its debts and liabilities properly payable, and had not been repaid to the bankers. The decision on this point was not appealed against, and therefore the House of Lords was not called upon to give a decision as to it, nevertheless Lord Blackburn says at p. 866: "The Court of Appeal, in the present case, held that though there was nothing that amounted to an assignment to the bankers of the claims of those who were paid off by the money advanced, yet if it could be shown that such claims were in fact paid off thereby, there was an equity in substance to give them, the bankers, the same benefit as if there had been such an arrangement. This is an important decision. It seems to be justice; whether it is technical equity is a question which, I think, is not now before this House."

RULE IN SHELLEY'S CASE.

The other case in this number which seems to require notice is *Bowen v. Lewis* at p. 890. It certainly does not come within the theme of these articles to attempt to note in a concise form the decision upon the construction of what Lord Cairns calls "the very difficult and obscure will," which was before the House, much less to attempt to trace the reasoning in the different judgments, but there are one or two *dicta* on the Rule in Shelley's case to which attention may be called. The first is by Lord Selborne, at p. 898:

"The rule in Shelley's case, 1 Rep. 93 b, ought not, in my opinion, to be extended, so as to defeat unnecessarily the expressed intention, by straining the interpretation of such words as 'child or children,' when they are capable of being understood in their usual and primary sense," which he explains to be issue of the first generation. The second is by Lord Cairns, at p. 907, and throws a flood of light upon the true meaning of the rule in Shelley's case: "I observe that it has been said that the rule in Shelley's case, as it is called, is a technical rule, and that in considering whether you must apply the rule in Shelley's case, you ought to proceed as if you were dealing with a technical rule, and not to give way to technicality unless it be absolutely necessary. I am bound to say that in my opinion the rule in Shelley's case is not only not a technical rule, but it is the very opposite of a technical rule. It is a rule which has been established through a long course of decisions extending over a great many generations, and upon the ground, as I understand it, that it is desirable to avoid the effect of technicality. The foundation of the rule in Shelley's case, as I understand it, is this: You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue generally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in Shelley's case. Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case

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it will not go through the issue generally, but only through the descendants of that particular head of the issue. Therefore I repeat that the rule in Shelley's case appears to me not to be a technical rule, but to be a rule of substance in order to give effect to the intention."

LAW SOCIETY.

MICHAELMAS TERM, 1884.

THE following is the *resumé* of the proceedings of the Benchers, published by authority:—

During this term the following gentlemen were called to the Bar, namely:—Messrs. Mackintosh, Carruthers (awarded honors and silver medal), Burwash (awarded honors and silver medal), Collier, Robertson, Douglas, Hutcheson, Valin, Grace, Symons, Saunders, Allen, Weld, Bunting, Sorley, Marshall, Waddell, Decatur, Lawrence, Weir, Nelson, W. D. Jones, Proudfoot, D. F. McArdle. (These names are arranged in the order in which the candidates appeared before Convocation for call.)

The following gentlemen received Certificates of Fitness, namely:—Messrs. Knowles, Witherspoon, Murphy, Proudfoot, Burwash, Valin, Ryerson, Richardson, Middleton, Palmer, Sproule, Blackburn, Hayes, Symons, Morphy, Allan, Flock, Gordon, Duncan, Carswell, Bunting, Milligan, W. D. Jones, Scilly, C. F. Smith, Weld and Lawrence.

The following gentlemen passed the Intermediate Examinations, namely:—

First Intermediate.

C. J. Atkinson, honors and first scholarship, and Messrs. Grierson, Cameron, W. K. O'Flynn, Ross, Willoughby, Macdonald, Cameron, D. O. Denovan, A. M. Bell, Sinclair, Snedden, Percival, Le Visconte, Moore, Beattie, Gould, Hislop, Smith, McCrimmon, Raines, Arnold, Cochran, Heaton.

Second Intermediate.

A. E. O'Meara, honors and first scholarship, A. M. Taylor, honors and second

scholarship, W. S. Brewster, honors and third scholarship, H. Wissler, R. B. Beaumont, C. T. Glass, E. K. C. Martin, E. A. Holman, honors, and Messrs. Urquhart, Rogers, Fisher, A. A. McIntosh, Hardy, Ormiston, Judd, Clarke, Grant, Gray, Raymond, Fisher, R. G. Lees, Nason, McArthur, Walker, Bennett, Chisholm, Morrison, Campbell, Brooke, Crothers and W. G. Fisher.

And the following candidates were admitted as Students-at-Law, namely:—

Graduates.

Francis A. Drake, George Watson Holmes, Arthur Stevenson, Herbert L. Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Halton Britton.

Matriculants of Universities.

Alexander Clark, Henry A. Wardell, H. F. Bongi, D. H. Chisholm, F. J. Travers, J. F. Hewitt, R. V. Clement, James A. H. Campbell, Robert L. Elliott, Robert Gordon Smith.

Juniors.

G. C. Gunn, H. W. Lawlor, J. Arthurs, W. Pinkerton, G. D. Heyd, F. B. Geddes, R. E. Lazier, F. F. Pardee, W. L. B. Lister, R. M. Macdonald, E. E. Du Vernet, F. S. Mearns, R. T. Wilgress, S. D. Lazier, R. Segsworth, J. H. McGhie.

MONDAY, 17TH NOVEMBER.

Present—The Treasurer, and Messrs. Moss, MacLennan, Hoskin, Irving, Bethune, Cameron, Mackelcan, Robertson, Morris, Murray, S. H. Blake, Foy, Kerr, L. W. Smith, McMichael, Read, Guthrie and Hudspeth.

The minutes of last meeting were read. The Secretary reported that the name, J. M. Best, who was called in Easter Term, 1884, was omitted by mistake from the minutes, and that the name of Leonard Harstone, who was called in Hilary Term, 1880, was also omitted by mistake from the minutes.

Ordered, that the minutes of Easter Term, 1884, be corrected by the insertion of the name of J. M. Best, as called to the Bar in that term, and that the minutes of Hilary Term, 1880, be corrected by the insertion of Leonard Harstone's name, as called to the Bar in that term.

A letter from Col. Hewitt, relating to

LAW SOCIETY.

the Military College at Kingston was referred to the Legal Education Committee for consideration and report.

The letter from Mr. Morgan accompanying the Queen's Book was read, and the Treasurer reported that he had acknowledged the same.

The Finance Committee reported that they had considered the question of the care and proper maintenance of the grounds about Osgoode Hall, and recommended that the work in connection with them be given to Mr. James Stephens, a skilled gardener who had tendered for the same.

The report was adopted on the understanding that the tender should include the manuring of the trees, and the planting of fresh trees, the manure and trees to be provided by the Society.

TUESDAY, 18TH NOVEMBER.

Present—The Treasurer and Messrs. Moss, Morris, Bethune, J. F. Smith, Foy, Britton, Irving, Hudspeth, MacLennan, Hoskin, S. H. Blake, Murray, Martin, Read and Kerr.

The minutes of last meeting were read.

Mr. Martin, from the County Library Aid Committee, presented their report as follows:—

COUNTY LIBRARY AID COMMITTEE.

OSGOODE HALL, 18th Nov., 1884.

The County Libraries Aid Committee beg leave to report as follows:—

1. The time fixed by the Rule 141 for the reconsideration of the scheme for establishing County Libraries expired in June last, and under the terms of this Rule the whole question is now open for reconsideration.

2. In February last our Committee issued a circular calling the attention of the profession to the subject, requesting that all applications for the establishment of libraries should be made promptly, and inviting suggestions as to the establishment or continuance of County Libraries. This circular was sent to the County Judge, County Attorney and Deputy Clerk of the Crown in each county and to many members of the profession.

3. The Committee has received and considered information and suggestions from several of the County Judges and many members of the profession upon the subject of the County Libraries.

4. The Committee finds that the libraries have proved of great value to the judges and the profession generally, and recommends that the system be continued and the County Libraries maintained and placed on a permanent footing.

5. Applications have been received since February last for the establishment of three new County Libraries, i.e., County of Welland, County of

Essex and County of Perth. In the case of the County of Welland some formal proofs are yet required. In the Essex case the articles of incorporation require that the library is to be kept at Windsor, where the County Judge resides and where the Judge's Chambers and the Warden's offices are kept, and almost all the practitioners reside (there being no resident practitioners in the County town) and the Committee recommends that under the circumstances this change be permitted. In the County of Perth case the application has not been completed owing to there being no suitable room for the library in the Court House, and no arrangements yet made for keeping the library elsewhere, but these difficulties are expected to be overcome shortly, and this Committee recommends that the usual grant be made to these associations when proof of their organization and the other proofs required by the rules have been duly completed and reported on to the Finance Committee.

6. A statement is annexed shewing the sums actually contributed to the seven County Libraries now in operation, the gross amount being \$6,069 of which \$2,820 are for Initiatory Grants, and \$3,249 for annual grants spread over the four years.

7. The Committee recommends that the Initiatory Grant to libraries already established be increased in cases where the initiatory grant received from the Law Society has not equalled the sums paid in cash, and the value of the books given to the County Library Association provided that such increase should not in the whole exceed the sum of \$20 for each practitioner resident in the County at the date of the establishment of such association, and in case contributions in money or books made to any existing library association and to be taken into account in estimating its first grant have been sufficient to entitle it to the maximum grant of \$20, the contributions may be supplemented at any time before 1st May, 1885, and that any future applications for the establishment of County Libraries should be referred to Convocation to be dealt with as the state of the finances of the Law Society may permit and Convocation shall see fit.

8. The Committee recommend that the annual grant should hereafter be based upon the amount contributed in cash for annual subscriptions by the members of the association instead of being regulated as at present to a great extent by the number of practitioners resident in each county.

9. The Committee believe that the change will not only give the members of these associations a greater inducement to contribute to the maintenance of the libraries, but will afford a satisfactory assurance to the Law Society for the efficient carrying out of the scheme, the adoption of this principle will not it is believed materially increase the annual grant to be made by the Law Society as it would appear from the returns that in every county there are resident practitioners who are not contributors to the funds of the County Libraries. The annual subscription under the present system ranges from \$2 to \$10 per annum, but in most cases \$5 is adopted, and this sum seems to be reasonable and within the reach of all practitioners.

9a. The Committee recommend that in future the annual grants be made on the basis of the Law Society contributing an amount equal to that

LAW SOCIETY.

actually paid in by the members of the association during the fiscal year, not exceeding \$5 for each member of the association, and that this rule should go into force and apply to the next annual grant.

9b. The Committee recommends that the fiscal years of the association should begin on 1st January and end on 31st December in each year, that the reports and financial statements covering the fiscal year be sent in promptly after 31st December, and the annual grants paid as soon as practicable after the receipt of the reports provided that where reports are not received before 10th January payments shall not be made unless otherwise ordered till three months after the receipt of the report.

10 The Committee recommends that rules be adopted for the establishment and maintenance of County Libraries in accordance with the terms of this report.

(Signed) EDWARD MARTIN, *Chairman*.

Circular referred to in Report.

COUNTY LIBRARIES AID COMMITTEE,
OSGOODE HALL, Toronto, 9th Feb., 1884.

SIR,—The County Libraries Aid Committee have been authorized by the Law Society to take steps to ascertain whether any more County Libraries are likely to be formed.

The County Libraries were established under rules of the Law Society which will be found in the *Canada Law Journal* for 1879, p. 180.

Subsequently these rules were amended by increasing the initiatory grant from \$6 to \$12. See *Canada Law Journal* for 1882, p. 357.

County Libraries have been established at Hamilton, London, Brantford, Peterborough, Whitby, Kingston and Walkerton, and have been found of great service.

It is felt that a sufficient time has now elapsed to test the practical working of the County Libraries, and it is desirable without further delay to frame rules for placing them on a permanent footing and making suitable provision for their maintenance, but before these rules are adopted it is desired to call the attention of the members of the profession, resident in the different county towns, where there are no County Libraries to the necessity of immediately taking the proper steps to establish libraries before the scheme is finally closed.

It is the intention of the County Libraries Aid Committee to submit to Convocation at Easter Term (19th May next) their scheme for the future management and aid to be granted to the County Libraries.

It is needless to say that much will depend on the number of these libraries and the Committee can only deal practically with those then actually in existence.

The Committee, therefore, request that all applications for the establishment of County Libraries shall be completed and forwarded to J. H. Esten, Esq., Secretary of the Law Society, not later than 1st May next.

The Committee also hope that you will favour them with your views and any information or suggestions which may occur to you on the subject of the establishment or maintenance of County Libraries.

Yours truly,

(Signed) EDWARD MARTIN, *Chairman*.

Statement of Moneys paid the following County Libraries Association for the years 1880, 1881, 1882, 1883, and 1884:—

NAMES.	DATE.	Initiatory Grant.	Annual Grant, 1st 3 years.	Annual Grant, 4th & 5th y's.	TOTAL.	REMARKS
		\$	\$	\$	\$	
Hamilton .	1880	432	288	288		
	1881	....	288	....	
	1882	432	288	....	
	1883	....	....	288		
	1884	....	....	288	2016	
Middlesex .	1880	360	....	....
	1881	....	240	....	
	1882	360	240	....	
	1883	....	....	240		
	1884	....	....	180	1620	
Peterboro'.	1880	132	....	....
	1881	....	92	....	
	1882	....	92	....	
	1883	132	....	92		
	1884	....	....	92	632	
Frontenac.	1880	120	....	....
	1881	....	92	....	
	1882	....	72	....	
	1883	120	84	....	
	1884	....	....	34	522	
Brant	1880	102	....	....
	1881	....	76	....	
	1882	....	76	....	
	1883	102	....	76		
	1884	....	....	63	495	
Bruce	1880	126	....	....
	1881	....	80	....	
	1882	126	....	80		
	1883	276	....	....
	1884	....	....	96	372	
Ontario ...		2820	1720	1529	6069	

The report was read and received. Ordered to be considered forthwith. Considered and ordered to be further considered at the meeting of Convocation on Friday, 28th November.

NOVEMBER 22ND, 1884.

Convocation met.

Present—The Treasurer and Messrs. MacLennan, Irving, L. W. Smith, Hoskin, Morris, Moss, Bethune and J. F. Smith.

Mr. Irving moved, seconded by Mr. J. H. Morris, That the Reporting Committee be requested to report to Convocation during this term upon the exact condition of the reports of the election trials and decisions since the publication of Hodgins' Reports, and also of the preparation for the next Digest. Carried.

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FRIDAY, NOVEMBER 28TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Irving, Guthrie, Morris, Hoskin, Martin, Robertson, Murray, Britton, Fraser, Bell, Foy, Cameron, J. F. Smith, McCarthy, Read and McMichael.

The consideration of Mr. Martin's motion to adopt the report of the Committee on County Libraries was resumed.

The report was ordered to be considered clause by clause. Each clause was carried. The report was adopted.

Mr. Martin moved for leave to bring in a rule in pursuance of the report. Carried.

The rule was brought in.

Mr. Martin moved that the rule be read a first time.

The rule was read a first time, and is as follows:—

COUNTY LIBRARIES.

New Rule adopted 28th November, 1884, in pursuance of Report dated 18th November, 1884.

All existing rules upon the subject of County Libraries are hereby repealed, and the following Rule is substituted therefor:—

Rule 142. "That until further ordered, Branch Law Libraries for the use of the Courts and the profession may be established and maintained in any county town, or, in exceptional cases, in such other place in the county as Convocation may allow, on the following conditions:—"

1. That to "The County Libraries Aid Committee," shall stand referred all correspondence on the subject, and the Committee shall have power, subject to the directions of Convocation, to work the scheme so far as the Society is concerned; the Finance Committee retaining its control over expenditure.

2. That the practitioners in any county or union of counties may form a Library Association, under chapter 168 of the Revised Statutes of Ontario, by the name of "The (name of the county town or the county, or union of counties) Law (or Law Library) Association."

3. That it shall be provided by the Constitution of the Association, that—

(a) The trustees thereof shall hold all the books thereof on trust, in case of the dissolution or winding-up of the Association, or the disposal of its property, to satisfy and repay to the Law Society all sums advanced by the Society to the Association.

(b) That a room for the custody and use of the books, and proper arrangements for their custody, shall be provided if possible in the Court House.

(c) That the books shall be for the use of the Judges of the county and of those practitioners who become members of the Association and pay the prescribed annual and other fees, and also for use, during Courts and hearings before the Master in Chancery, of the Judges, and of all members of the profession residing out of the county.

(d) That the prescribed annual and other fees

shall not exceed for those practitioners who do not keep offices in the county town, or in the town in which the Library is kept, one-half of the amount fixed for those who do keep offices in the county town.

(e) That at least one-half of the said fees and the whole of the aid at any time granted by the Law Society shall be applied in the purchase, binding, and repairing of books for the Library.

(f) That the Association shall make an Annual Report to the Law Society, shewing the state of its finances and of its Library for the fiscal year, which shall commence on 1st January and end on 31st December of each year, with such other particulars as may be required by the Standing Committee.

4. That the Association shall transmit to the Law Society proof of its incorporation, and a copy of its declaration and by-laws containing the above provisions, and proof of the condition of its funds and Library; and proof that it has acquired a suitable room therefor, with such other particulars as may be required by the Standing Committee.

5. That the Standing Committee being satisfied that the conditions above named have been complied with, may report thereon to the Finance Committee in all cases in which applications have been received prior to 1st November, 1884, stating the amount to which, on the principle hereinafter stated, the Association is entitled, and thereupon the Finance Committee may authorize payment thereof. That in all cases in which applications shall be received after 1st November, 1884, such applications shall be referred to Convocation, to be dealt with as the state of the finances may permit and Convocation shall see fit.

6. That, it being expedient to grant more liberal aid to libraries during the early years after their institution, the grant in aid from the Society shall be for the initiatory or first grant an amount double the amount of the contributions in money actually paid, or of the value of books actually given, from all local sources, such grant, however, not exceeding a maximum sum of twenty dollars for each practitioner in the county or union of counties; and for each year thereafter an amount equal to the amount of the fees actually paid to the Association by its members, such grant, however, not exceeding a maximum sum of five dollars in respect of each paid subscription.

7. This rule shall extend to existing Library Associations.

8. In case the contributions in money or books made to any existing Library Association, and to be taken into account in estimating the amount of its first grant, have been insufficient to entitle it to the maximum first grant, hereby provided, it shall be competent to supplement such contributions at any time before the 1st May, 1885, and on evidence thereof being supplied, such Association may receive the balance coming to it in respect of the maximum first grant under this rule.

9. That all annual grants be payable within one month after the 31st day of December in each year, provided the required reports and information have been supplied within fifteen days thereafter, and that in case of default, the grant be not payable for three months after such reports or information have been supplied, unless otherwise ordered by the County Libraries and Finance Committees.

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10. That the Standing Committee shall report to Convocation on the 1st day of Hilary Term in each year on their operations for the previous year.

Mr. Martin moved for leave to read the rule a second time to-day. Carried unanimously.

The rule was read a second time.

The rule was ordered to be read a third time at the next meeting of Convocation.

SATURDAY, DECEMBER 6TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Moss, Hoskin, Martin, Meredith, J. F. Smith, Foy, Morris, Kerr, Murray, Irving, Read, Ferguson and Cameron.

Mr. Hoskin presented the report of the Discipline Committee on the case of Mr. C. R. Irvine, as follows:—

1. The Committee on Discipline, to whom the case of Mr. Irvine was referred for investigation, beg to report to Convocation that they duly notified him to appear before them, and that he appeared accordingly this day.

2. That they heard his explanation, and are of opinion that it is not satisfactory.

3. That his conduct in connection with the matter was unprofessional, and they recommend that he be called before Convocation to be severely censured.

All which is respectfully submitted.

(Signed) JOHN HOSKIN,
Chairman.

December 5th, 1884.

The report was read and received.

Ordered for consideration forthwith.

The report was adopted.

Ordered, That Mr. Irvine be called before Convocation to be severely censured.

Mr. Irving moved the third reading of Mr. Martin's rule on the subject of county libraries. Carried.

Mr. Irving moved that the rule do pass. Carried.

Mr. Foy moved, pursuant to notice, That the use of the dining room be granted to the Osgoode Legal and Literary Society for their next monthly dinner.

Mr. Cameron moved in amendment, That the use of the dining room be granted to the Osgoode Legal and Literary Society for their monthly dinner subject to such regulations as may from time to time be adopted by the Finance Committee.

The amendment was carried.

Mr. Meredith, in the absence of Mr. Britton, moved his motion as follows, namely:—

That the Reporting Committee see that immediately upon the making of any new rule or order of court, the same is printed and sent to the members of the profession. Carried.

Mr. Meredith gave the following notice, namely:—

That he would at the next meeting of Convocation move for the appointment of a committee to consider the expediency of providing for the establishment of law schools outside of Toronto, and also the expediency of providing for the holding of Intermediate and Final Examinations at a point east of Toronto, and one west of Toronto, as well as at Toronto.

Mr. Read gave notice that at the next meeting of Convocation he would move, That a rota of Benchers be formed to lecture in the law school; at least—lectures to be delivered by each Benchers on the rota, or by a substitute, at stated periods during the law school term, of which notice is to be given.

Mr. Irvine, pursuant to order, was called in and censured.

Mr. Irvine stated that he had been misled by Mr. Titus, and expressed his regret for his course and his determination not to repeat his error.

TUESDAY, DECEMBER 30TH, 1884.

Convocation met.

Present—The Treasurer and Messrs. Read, Martin, Moss, Meredith, J. F. Smith, Morris, Irving, MacLennan, Murray, L. W. Smith and McMichael.

The minutes of last meeting were read and approved.

Mr. MacLennan moved the following resolution, seconded by Mr. Moss, namely:

"The Benchers have heard with great sorrow of the death of Mr. Bethune, one of their number, at the early age of forty-five years.

"Mr. Bethune was for some time a lecturer in the Law School established by Convocation, and was afterwards elected a Benchers; and he continued to fill that position continuously for ten years, and obtained the respect, esteem and friendship of all his colleagues.

"Mr. Bethune's memory will long be cherished by his brethren of Convocation and of the Bar generally as that of a dear friend too early removed from those by whom he was loved and respected.

"The Benchers desire, also, to express their sympathy with Mrs. Bethune and her family in their great bereavement."

The resolution was unanimously adopted.

LAW SOCIETY.

Ordered, That a copy of the above resolution be engrossed and transmitted to Mrs. Bethune.

The Secretary reported the case of George E. Weir, with reference to whom an order was made on 18th November that his time had expired, his papers were now complete, and that he was entitled to his Certificate of Fitness.

Ordered, That Mr. Weir do receive his Certificate of Fitness pursuant to the order of 18th November.

The memorial of Louis De Souza, Esq., was read and received.

Ordered, That it be referred to the Legal Education Committee to enquire into and report upon the matter, and also further to report whether any, and if so, what rules, regulations, or by-laws should be made by the Law Society in respect of the call of persons called to the Bar by any of her Majesty's Supreme Courts of England, Scotland or Ireland.

Mr. Moss presented the report of the Legal Education Committee on the curriculum as follows:—

The Committee on Legal Education beg to report as follows:—

The committee have had under consideration the Curriculum for the Primary Examination for Students-at-Law and Articled Clerks, and recommend the accompanying curriculum for the years 1886 to 1890 inclusive for adoption by Convocation under Rule 23.

All which is respectfully submitted.

(Signed) CHARLES MOSS,
Chairman.

December 26th, 1884.

PRIMARY EXAMINATION CURRICULUM.

Students-at-Law.

CLASSICS.

- | | | |
|------|---|--|
| 1886 | { | Cicero, Cato Major. |
| | | Virgil, <i>Æneid</i> , B. I., vv. 1-304. |
| | | Cæsar, <i>Bellum Britannicum</i> . |
| | | Xenophon, <i>Anabasis</i> , B. V. |
| | | Homer, <i>Iliad</i> , B. VI. |
| 1887 | { | Xenophon, <i>Anabasis</i> , B. I. |
| | | Homer, <i>Iliad</i> , B. VI. |
| | | Cicero, <i>In Catilinam</i> , I. |
| | | Virgil, <i>Æneid</i> , Book I. |
| | | Cæsar, <i>Bellum Britannicum</i> . |
| 1888 | { | Xenophon, <i>Anabasis</i> , B. I. |
| | | Homer, <i>Iliad</i> , B. IV. |
| | | Cæsar, B. G. I. (vv. 1 to 33). |
| | | Cicero, <i>In Catilinam</i> I. |
| | | Virgil, <i>Æneid</i> , B. I. |

- | | | |
|------|---|------------------------------------|
| 1889 | { | Xenophon, <i>Anabasis</i> , B. II. |
| | | Homer, <i>Iliad</i> , B. IV. |
| | | Cicero, <i>In Catilinam</i> , I. |
| | | Virgil, <i>Æneid</i> , B. V. |
| | | Cæsar, B. G. I. (vv. 1 to 33). |
| 1890 | { | Xenophon, <i>Anabasis</i> , B. II. |
| | | Homer, <i>Iliad</i> , B. VI. |
| | | Cicero, <i>In Catilinam</i> , II. |
| | | Virgil, <i>Æneid</i> , B. V. |
| | | Cæsar, <i>Bellum Britannicum</i> . |

Translation from English into Latin prose, involving a knowledge of the first forty exercises in Bradley's, Arnold's composition and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to end of Quadratic Equations; Euclid, Bb. I., II. and III.

ENGLISH.

A paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

- | | |
|------|--|
| 1886 | Coleridge: <i>Ancient Mariner</i> and <i>Christabel</i> . |
| 1887 | Thomson: <i>The Seasons</i> , Autumn and Winter. |
| 1888 | Cowper: <i>The Task</i> , Bb. III. and IV. |
| 1889 | Scott: <i>Lay of the Last Minstrel</i> . |
| 1890 | Byron: <i>The Prisoner of Chillon</i> , <i>Childe Harold's Pilgrimage</i> , from stanza 73 of Canto 2 to stanza 51 of Canto 3 inclusive. |

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar.

Translation from English into French prose.

- | | | |
|------|---|---|
| 1886 | { | Souvestre <i>un Philosophe sous les toits</i> . |
| 1888 | | |
| and | | |
| 1890 | | |
| 1887 | | |
| 1889 | Lamartine's <i>Christophe Colombe</i> . | |

or NATURAL PHILOSOPHY.

Books—Arnot's *Elements of Physics*, or Peck's *Ganot's Popular Physics* and Somerville's *Physical Geography*.

Articled Clerks.

Arithmetic.

Euclid, Bb. I., II. and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-keeping.

Cicero, Cato Major, or Virgil, *Æneid*, B. I., vv. 1-304, in the year 1886, and in the years 1887, 1888, 1889, 1890 the same portions of Cicero or Virgil, at the option of the candidate, as noted above for Students-at-Law.

Co. Ct.]

HEARD V. HEWSON.

[Co. Ct.]

The report was read and received. Ordered for immediate consideration and adopted.

Ordered, that the curriculum proposed in the report be the curriculum for the time mentioned therein.

A letter from A. O. Jeffrey, Secretary of the Middlesex Law Association, enclosing a report of that Association, was read.

Mr. Meredith's notice of motion on the subject of a Law School and Law Examiners was read.

Mr. Meredith moves that the subject-matter of his said notice of motion and the said letter and report be referred to the Legal Education Committee to consider and report, and that the Committee be requested to confer with the deputation appointed by the Middlesex Law Association. Carried.

Mr. Read's notice of motion on the subject of the Law School was read.

Mr. Read moved that the subject-matter of his resolution be referred to the Legal Education Committee. Carried.

Mr. Moss moved that Mr. Meredith be added as a member of the Legal Education Committee. Carried.

Ordered, that a call of the Bench be made for the first Tuesday of next Term for the election of a Bencher in the place of James Bethune, Esq., Q.C., deceased.

CANADA REPORTS.

ONTARIO.

COUNTY COURT OF NORTHUMBERLAND AND DURHAM.

(Reported by W. R. Riddell, Barrister-at-Law.)

HEARD V. HEWSON.

Replevin Act—R. S. O. c. 537, sec. 18—*Capias in withernam, when to issue*—"Eloigned."

Under an *ex parte* order a writ of replevin was issued, directing the sheriff to replevy to the plaintiff a certain mare. Before the execution of the writ by the Sheriff, the defendant had sold the mare; whereupon the Sheriff made the following return to the writ: "The goods, chattels and personal property in the within writ mentioned, viz.—one brown mare, cannot be found by me in the possession of the defendant herein. The defendant informs me that he sold the same, and does not know where it now is. I do not know where said

property is, and cannot have a view of it to deliver it as I am herein commanded." On this return the plaintiff took out a writ of *capias in withernam*, following, *mutatis mutandis*, the form given as No. 3 in R. S. O. c. 53; instead of the words "eloigned by the said C. D. out of your county to places to you unknown," in form 3, were inserted the words "were sold by the said George Hewson, and that you do not know where the said property is, and cannot have a view of it to deliver it." Under this writ another mare of equal value with the former, and belonging to and in the possession of the defendant was seized by the Sheriff and delivered to the plaintiff.

Baines for the defendant obtained a summons to set aside the writ of *capias in withernam*, and the proceedings thereunder on the grounds:

1. That the return of the Sheriff to the writ of replevin did not warrant the issue of the writ of *capias in withernam*.

2. That the writ did not conform to the form required by the statute in that behalf.

3. That as appeared by affidavit the property to be replevied had not been eloigned by the defendant, but had been sold *bona-fide* and for good and valuable consideration, etc.

Riddell, for plaintiff, as to the first point relied upon F. N. B. ed. 1730, p. 157 [68] *le rit de replegiare de averiis* G (a); and referred, also, to Arch Q.B. Prac., 13th ed., pp. 891, 898.

As to the second point he referred to sec. 18 of R. S. O., c. 53, c. 18, which requires the writ of *capias in withernam* to be in the words or to the effect of Form 3, and the writ should conform to the actual return.

As to the third point he contended that "eloigned" here and elsewhere meant removed, whether *mala fide* or *bona fide*, and did not necessarily mean removed to avoid seizure.

Baines, *contra*.—"Eloigned" means removed *mala fide* and to avoid seizure, and the writ was never intended for such a case as this.

CLARK, Co. J., gave judgment to the following effect:—"I can find no authority, and I have been referred to none, to bear out the contention that to warrant the issue of a *capias in withernam*, the property directed to be replevied must have been removed to avoid seizure. "Eloigned," *elongata*, means "removed"—the law dictionaries do not add "fraudulently," or words indicating *mala fides*. Fitzherbert is authority, if any were required, that the return of the sheriff to the writ of replevin warrants the issue of the *capias in withernam*. And the *capias* conforms to the actual return, which is what, I think, the Replevin Act, sec. 18, requires. The summons must be dismissed, with costs in the cause to the plaintiff in any event.

Sup. Ct.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**SUPREME COURT OF CANADA.****SULTE V. THE CORPORATION OF THE CITY
OF THREE RIVERS.**

*British North America Act, 1867, secs. 91, 92—
Liquor License Act of 1878—41 Vic. ch. 3 (P.Q.)
—Powers of Local Legislature to regulate sale
of intoxicating liquors—Delegation of power to
Municipal Corporations—41 Vic. ch. 3, secs. 36,
37, 255—Construction of—By-law—Validity of
—20 Vic. ch. 129, and 38 Vic. ch. 76, sec. 75.*

By a by-law passed by the Corporation of the City of Three Rivers on the 3rd of April, 1877, under the authority conferred upon them by the charter of the city, 20 Vic. ch. 129, and by 38 Vic. ch. 76, sec. 75, a license fee of \$200 was imposed on persons who were desirous of obtaining a license to keep a saloon and sell intoxicating liquor.

By sec. 36, 41 Vic. ch. 3 (Q.), it is enacted that on each confirmation of a certificate for the purpose of obtaining a license for the cities of Quebec and Montreal, the sum of \$8 is payable to the corporation of each of those cities, and by other corporations, for the same object, within the limits of their jurisdiction, a sum not exceeding \$20 may be demanded.

Sec. 37 enacts, "The preceding provision does not deprive cities and incorporated towns of the rights which they have by their charters or by-laws."

Sec. 255 provides that "the dispositions of this Act shall in no way affect the rights and powers belonging to cities and incorporated towns by virtue of their charter and by-laws, and shall not have the effect of abrogating or repealing the same."

On the 31st of March, 1880, S. (appellant) filed with the Council of the Corporation of Three Rivers the certificate required by sec. 2 of 41 Vic. ch. 3 (Q.), and on their refusal to confirm the certificate except upon payment of the sum of \$200 imposed by the by-law of the 7th April, 1877, he petitioned for a writ of mandamus to declare the by-law null, and that

the officials of the Council be ordered to sign and deliver the certificate in question.

Held, affirming the judgment a quo that the provisions of the Liquor License Act, 1878, (P.Q.), are *intra vires* of the powers of the Legislature of the Province of Quebec. (See *Queen v. Hodge*, 9 App. Cas. 117.)

2nd. That the powers of sec. 37 excepts the by-law made on the 7th April, 1877, from the provision of sec. 36, and that the powers which the Corporation of Three Rivers has to impose license fees on the sale of intoxicating liquors in virtue of 21 Vic. ch. 109, and 38 Vic. ch. 76, have not been repealed by the Liquor License Act, 1878.

Doutre, Q.C., for appellants.

Denoncourt, Q.C., and *MacDougall* for respondents.

Appeal dismissed with costs.

CHANCERY DIVISION.

Proudfoot, J.]

[October 27.]

Re STANDARD FIRE INS. CO.*Winding up proceedings—Contributories.*

Appeal from Master's report which placed certain parties on the list of stockholders as contributories to the extent of their unpaid stock.

CHISHOLM'S CASE.

C. having been communicated with by the president of the company, agreed to act as a director and gave his note for \$500 in order to obtain a qualification. The president subscribed for fifty shares stock for him which would be the amount that the \$500 note would pay ten per cent. on. C. then acted as a director for some time without (as he alleged) knowing that any stock had been subscribed for him. Subsequently he was notified of a five per cent. call on fifty shares, and he at once communicated with the president who told him not to mind and that the secretary would be instructed, and he was not troubled again about it. At this time his note had been carried by the company and he had paid nothing. The president then absconded and he was notified of a five per cent. call, and he gave a note for \$250 in payment of same, not (as he alleged) because he was liable but because he was told that would settle his total liability, and he did not wish to enter into a suit.

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Held, that he was properly placed upon the list of contributories.

TURNER'S CASE.

T. signed a power of attorney to C. to subscribe for twenty shares of stock and delivered it to him on the understanding that it was not to be used except he became a director of the company. C. directed the accountant to enter T.'s name in the stock ledger as a stockholder, which was done. Blotting pads were issued and an advertisement published in a newspaper and a return made to the government with T.'s name inserted as a director in the two former and as a member in the latter, but no board was ever formed with T. as a director. T. swore that he never saw the pads, advertisement or returns, and that he did not know his name was in any of them, and on receipt of a notice claiming a five per cent. call he at once repudiated all liability.

Held, that as T. made it a distinct stipulation that unless he was made a director the power of attorney was not to be used, he made such a stipulation a condition precedent to his becoming liable as a shareholder, and that the circumstances brought the case within the line of cases of which *In re National Equitable Provident Society*, Wood's case L. R. 15 Eq. 236 is an example, and that T.'s name must be removed from the list of contributories.

FINDLAY'S CASE.

Held, that F. was not properly a contributory on the same grounds and principle as in Turner's case.

BARBER'S CASE.

B. signed a power of attorney to subscribe for stock under the same circumstances as Turner, but was asked by letter to fix the time to suit himself to pay the ten per cent. call, and he added to the power a clause that the ten per cent. was to be payable in one year from date. He was also notified by the secretary of the company that he was a shareholder, and a notice of a meeting was sent to him. There was no evidence to show that he made his becoming a director a condition precedent to his becoming a shareholder.

Held, that the entry by the accountant of

B.'s name as a stockholder was equivalent to an entry by C. to whom the power was given and was no delegation of any discretionary power, but a mere ministerial act.

Held, also following *National Insurance Co. v Egleson* 29 Gr. 406 that it was not material that the name was not entered in the subscription book or that there was no specific allotment of stock, and that B. was properly placed on the list of contributories.

COPP, CLARKE & CO.'S CASE.

This case was somewhat similar to Barber's case but there was an understanding that the calls were to be paid in work, and \$100 worth of work was so done and credited in the books of the company, and C. C. and Co. printed the pads, saw the advertisement in the paper and received notices of calls.

Held, that C. C. and Co. were properly placed on the list of contributories.

CASTON'S CASE.

C. signed the power of attorney on the understanding that he was to be solicitor of the company in Toronto, and that he was to pay no cash on his stock but to get credit for his services. A certificate that he was a holder of ten shares was sent to him, and was in his possession for some years, and he was appointed solicitor under the seal of the company, received notices of meetings and calls and did not expressly repudiate his liability.

Held, that C. who was a professional gentleman, and should have known that it was necessary to have his shares cancelled, was properly placed upon the list of contributories.

Lash, Q.C., and *A. C. Galt*, for the appellants.

Bain, Q.C., for the liquidators.

Laidlaw, for the company.

Boyd, C.]

[Dec. 17, 1884.]

RE KERR, KERR V. KERR.

Will—Testator's estate to be valued by executors—
Certain of the beneficiaries consulted as to valuers
to exclusion of others.

A testator provided in his will that on the death of his widow his executors, who were two of his children, should have his farm valued, and gave permission to his son E. to take the

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farm at that valuation, after which the proceeds were to be divided amongst all the other children.

On the death of the widow the executors did proceed to value the farm, but they asked E., who had made up his mind to keep the farm, to aid them in nominating three valuers, while none of the other children were notified of what was going on or asked to be present at the fixing of the valuers. There was no evidence that the valuers had reached their conclusion, other than in a legitimate and upright way. Certain of the children now impeaching the valuation and asking for administration:

Held, that there should be another valuation of the farm, and if the parties desired it, it might be referred to the master for that purpose, or the executors might on notice to all interested proceed to do what was needful in that behalf.

The three valuers who were called in were required to exercise in some sense judicial functions, and it would be contrary to first principles to let the one who was to purchase suggest or appoint his own nominees to fix the value without notice to those interested in getting the best price.

W. Cassels, Q.C., for the plaintiff.

Boyd, C.]

[Dec. 17, 1884.]

GRAHAM V. WILLIAMS.

Mechanics' lien—R. S. O. c. 120—Right of lienholder against tenant to charge the land of the landlord.

G. supplied bricks to W., who had leased certain land from H., with the right to purchase on certain terms. The contract for the supply of the bricks was made between G. and W. and on W.'s credit; although H. was aware that they were being supplied and that a building was being erected on his property and he had agreed to supply two-thirds of the money required for the building by way of loan to W. on the security of the property. W. did not exercise his right of purchase and G. filed his lien against both W. and H. and brought an action to charge the interest of H. with the lien.

Held, that the Mechanics' Lien Act, R. S. O. c. 120, intended something more than the landlord's quiescence or acquiescence while the building is being erected in order to subject

his land to the payment of his tenants' debts, and that in such a case the fee may be charged, but only when consent thereto is given in writing by the owner in fee. Under the circumstances it cannot be said the bricks were furnished on behalf of H. Without a consent in writing as provided by s. 6, s.-s. 2, his mere knowledge of what was being done would not make his estate liable if it turned out that the tenant W. was not able to complete his purchase. The work was not done "for his direct benefit." The Act contemplates direct dealing between the contractor and the owner, and the words, "touching privity and consent" in the interpretation clause are referable to the relations existing between the owner and sub-contractors and are not to be so expanded as to embrace the case of a proprietor who is cognizant of and encourages the improvement of the property by a person holding under him who has yet such an estate in the land that he is the owner within the meaning of the Act as to the contractor whom he employs. The agreement to supply money by way of a loan does not change the character of the transaction so as to place W. in the position of a mere agent of H.

O'Gara, Q.C., for the plaintiff.

Gormully, for the defendant Henry.

Full Court.]

[Dec. 18, 1884.]

BROOKES V. CONLEY ET AL.

Verbal agreement—Action to have same expressed in writing—Jurisdiction—Declaratory judgment.

In this action B. set up a verbal agreement entered into between himself and C., they being adjoining proprietors of land, to the effect that C. should build a house in such a position that the southern wall would encroach nine inches upon B.'s land, and B. was to be allowed at any time to use that wall as a party wall upon payment of half the expenses of its original erection by C. This agreement was verbal and was made in 1873, and shortly afterwards C. erected his building as agreed upon. B. began this action before the expiration of ten years from the date of the verbal agreement, and B. claimed that he was entitled to have the bargain put into writing and executed by C. so as to enable him to register it, and

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asked a judgment declaring him entitled to all the rights and privileges contained in the verbal agreement or in the alternative for possession of the nine inches of his land which was covered by the wall of the building erected by C.

C. set up (amongst other defences) that whatever was done on the nine inches was done by the leave and license and at the express instance of B., and further that he never did, nor did he then, object to B. being allowed to build against and use the wall in question as a party wall, and that he had always acquiesced and conceded B.'s right so to do on payment of half the actual cost thereof.

Held, affirming the decision of FERGUSON, J. that under these circumstances the action must be dismissed.

B. had no ground for asking that the verbal agreement should be manifested in writing. No doubt he might be prejudiced if C.'s land was conveyed to a registered purchaser for value without notice of the agreement, and might also be prejudiced by the difficulty of preserving evidence to prove the oral agreement. The appropriate remedy for these possible wrongs would be a declaration of B.'s rights by virtue of the agreement, but, under the jurisprudence of England, there is no jurisdiction to ascertain and declare rights before a party interested has actually sustained damage. Here B.'s claim was virtually admitted, and it was open for him at any moment to make use of the wall as a party wall upon payment of half the costs.

Dickson, Q.C., for plaintiff.

Dougall, Q.C., for defendant.

Full Court.]

[Dec. 18, 1884.]

FITZGERALD V. WILSON ET AL.

Tax sale.

A tax sale of certain lands made on February 13th, 1882, was impeached on the grounds:—

1. No proper proof of taxes being due.

The evidence supplied was by the production and proof of the original non-resident collector's roll for 1877 in which this land appeared in arrear for \$20.60. That was the only roll in which the land appeared for that year. Similar rolls were proved for 1878, with the taxes at \$18.60, and for the year 1879, with

taxes at \$20.60. These sums with interest amounted to \$76.92, to realize which the land was sold. Proof was also made of the due preparation of the warrant to sell, and the due advertising in the official gazette. It was not disputed that the land was properly dealt with as non-resident land during these years.

Held, that the proof was sufficient, for the rolls produced showed in truth, the very inception of the rates and taxes in question by the entries on the non-resident roll in pursuance of 32 Vict. c. 36, s. 92.

Chrysler v. McKay, 5 S. C. R. 436 distinguished:

2. Because the warrant to sell was not addressed to any one.

The warrant recited that the treasurer had submitted to the warden the land liable to be sold and proceeded: "Now I, the warden, command you to levy," etc. This was given to the proper officer to sell, *i.e.*, the treasurer, was produced by him, and was acted on by him. The warrant purported to be drawn up pursuant to the authority given by 32 Vict. c. 36, s. 128.

Held, that the warrant as drawn up and acted on justified the sale. The Court will not be punctilious in adhering to the letter of the statute where there is reasonable accuracy, and no possible prejudice resulting from literal inaccuracy in the frame of the warrant to sell.

J. MacLennan, Q.C., for the plaintiff.

S. H. Blake, Q.C., and *Walsh*, for the defendants.

Full Court.]

[December 19.]

LANGTRY V. DUMOULIN.

Rectory endowments — Rectory Lands — 29-30 Vict. c. 16—Construction—Maintenance.

Certain land was granted by patent from the Crown dated December 26, 1817, to D. B., J. B. R. and W. A. as trustees for the sole use and benefit of the parishioners of the Town of York forever as a churchyard and burying ground for the inhabitants of the said Town of York, and appurtenant to the church then built thereon. This patent was surrendered to the Crown and another patent dated September 4, 1820, was issued to the same trustees reciting the terms of the former patent, and that it was intended that so much only of the said land as was necessary for the purposes of a churchyard and burying ground should be so approp-

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priated and that such part of the said land as was not so required for the use of the parishioners should be held upon and for the trusts and uses thereafter stated, which trusts were as follows: "In trust to hold the same for the sole use and benefit of the resident clergyman of the said Town of York, and his successors appointed or to be appointed Rectors of the Episcopal Church therein to which the said land is appurtenant, to make lease of the same with the assent of the incumbent, and to receive the rents due or to grow due therefrom to his use . . . and when a rectory was erected and an incumbent appointed . . . the trustees should convey to such incumbent . . . and his successors forever as a corporation sole to and for the same uses and upon the same trusts." Certain other lands were also granted by another patent from the Crown dated April 26th, 1819, to W. D. P., J. B. and J. S. upon trust to observe such directions and to consent to and allow such appropriation and disposition of them and to convey the same in such manner as should thereafter be directed by order in Council. These lands were subsequently conveyed by W. D. P., J. B. and J. S. to the other trustees, D. B., J. B. R. and W. A., by deed dated July 4th, 1825, reciting an Order-in-Council dated December 2nd, 1824, requiring the grantors to convey the said lands to the grantees for the use of the church and of the clergyman incumbent thereon for the time being (which recital was the only evidence of the contents of the Order-in-Council). "Upon trust nevertheless that the grantees should hold the lands for the sole use and benefit of the resident clergyman of the Town of York and his successors appointed or to be appointed incumbent of the parsonage or rectory of the Episcopal Church, according to the rites and ceremonies of the Church of England therein to which the said lands are appurtenant, which deed contained a proviso for conveyance by the trustees upon the erection of a parsonage or rectory and presentation thereto in the same terms as that contained in the patent of the 4th of September, 1820. The Town of York was subsequently incorporated as the City of Toronto, and by letters patent dated the 16th of January, 1836, a parsonage or rectory was erected and constituted in the said City of Toronto designated as the first parsonage or rectory within the Township of York,

otherwise known as the parsonage or Rectory of St. James, and 800 acres of land were set apart as a glebe or endowment to be held appurtenant with the said parsonage or rectory and that the Hon. and Rev. J. S. was duly presented to be the incumbent of the said parsonage or Rectory of St. James, and by deed poll dated the 10th of February, 1841, reciting the patent of the 4th of September, 1820, the deed of the 4th of July, 1825, and the presentation of the Hon. and Rev. J. S., the said J. B. R., W. A. and J. G. S., the then trustees, granted the said lands described in the said patent and deed to the said the Hon. and Rev. J. S., Rector of St. James, and his successors in the said rectory forever as a corporation sole to and for the same uses and upon the same trusts as are mentioned and expressed in the said patent and deed. The Rev. H. J. G. succeeded the said Hon. and Rev. J. S. as incumbent on the 16th of February, 1847, and was in possession of the said lands and in receipt of the rents and profits thereof until the time of his death, which happened on the 20th of March, 1882. In a suit brought by the incumbents of several rectories which were subsequently erected in the said City of Toronto and the Synod of the Diocese to have the lands covered by the patent of 1820 and the deed of 1825 divided up under the provisions of 29 and 30 Vict. c. 16, it was

Held (sustaining the judgment of FERGUSON, J.), that the lands in question were covered by the terms of the Act. That prior to the year 1866 there were rectory lands derived directly from the Clergy Reserves and lands specially granted to trustees which were treated as endowments for rectories, and that the Legislature intended to deal with both classes. That the delivery up and cancellation of the patent of 1817 being to correct an error could not be held to be such a consideration as would make the patent of 1820 a grant for value. That Crown grants which were of a *quasi* public character were different from private gifts, and the Synod in the case of the former had petitioned for and obtained the power they desired. That 14-15 Vict. c. 175 sec. 2 (C. S. C. ch. 74) affords strong evidence that prior to the year 1866 there had been endowments for rectories out of the public domain as well as out of the clergy reserves.

After the hearing and before the appeal was

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argued a motion was made to strike the case out of the list on the ground of maintenance, and it was shown that the defendant, the Rev. J. P. D., did not wish to proceed with this suit, but that as he was pressed to do so by his vestry and churchwardens he allowed his name to be used as appellant upon being indemnified by the latter as to costs.

Per BOYD, C. There was maintenance in the suit, but not in the criminal sense. The vestry and churchwardens have so intermeddled in the litigation that their conduct savours of maintenance. Their claim, if anything is antagonistic to the defendant, the Rev. J. P. D., and not a common interest. The Court should not allow strangers to come in and promote an appeal when the defendant does not wish it.

Per PROUDFOOT, J. The churchwardens cannot be held liable to the objection of maintenance. There were various ways in which the success of the defendant, the Rev. J. P. D., would be beneficial to them, and they believed they had an interest in the result of the action.

H. Cameron, Q.C., *MacLennan*, Q.C., and *Moss*, Q.C., for the plaintiffs.

Howland and *H. D. Gamble*, for defendant *Dumoulin*.

A. Hoskin, Q.C., for the township rectors.

E. D. Armour, for the defendants, *Darling* and *H. G. Baldwin*.

Divisional Court.] [December 23, 1884.

ROSS V. MALONE.

Sak of lands by sheriff before return of fi. fa. goods
—*Irregularity*—43 Geo. III. c. 1—R.S.O. c. 66.

Held (sustaining the judgment of FERGUSON, J.), *Doe dem Spafford v. Brown*, 3 O. S. 95, and *Ontario Bank v. Kirby*, 16 C. P. 35 decided under 43 Geo. III. c. 1 that the issue of an execution against lands before the return of an execution against goods is an irregularity and not a void proceeding, and that that is the law under R. S. O. c. 66, the provision of each Statute seeming to be as nearly equivalent as language can make them without using the same words.

Loumt, Q.C., for the plaintiff who appealed.

Pepler, for the defendant *Boys*.

H. Lennox, for the defendant *Giffin*.

MASTER'S OFFICE.

Mr. Hodgins, Q.C.] [October

STEWART V. DICK.

Will—Legacy—Charge on real estate.

A testator devised his real estate and chattel property (excepting some specific bequests to his wife) to his son Robert subject to the payment of his just debts, funeral expenses and certain specified legacies.

By a codicil he directed the chattel property (except the specific bequests to his wife) to be sold and the proceeds equally divided amongst all his children.

Held, the specific legacies were a charge on the real estate.

G. H. Watson, for the legatees.

Bain, Q.C., *contra*.

PRACTICE.

Mr. Hodgins, Q.C.] [November.

CLARK V. UNION FIRE INSURANCE CO.

CHABOT'S CASE.

Production—Foreign commission.

Books and documents produced in an action may, where a proper case is made out, be sent out of the jurisdiction for the purpose of the examination of witnesses before a foreign commission.

But documents produced in another action which is *subjudice* will not be taken from the office for such a purpose.

R. S. Cassels, for the applicant.

W. A. Foster, for the plaintiff.

Mr. Hodgins, Q.C.] [November.

RE QUEEN CITY REFINING CO.

Insolvent company—Winding up—Jurisdiction of judicial officers named in 47 Vict. (D) ch 39—Delegation of their powers.

The Dominion Insolvent Companies' Act, 45 Vict. c. 23, as amended by 47 Vict. c. 39 authorizes the Master in Chambers, the Master in Ordinary, or any local master or referee to exercise the powers conferred upon the Court

Prac.] NOTES OF CANADIAN CASES—RULES OF THE SUPREME COURT OF ONTARIO.

in Ontario, for the purpose of winding up insolvent companies. The Master in Chambers, as one of the judicial officers named in the Act, made an order for the winding up of an insolvent company, and referred it to the Master in Ordinary to settle the list of contributories, take all necessary accounts, make all necessary inquiries and reports, and generally to do all necessary acts, matters, and thanks for the winding up of the business of the said company.

Held, (1) that the powers vested in the judicial officers named in the Act were conferred upon them as *personæ designata* which they were not authorized to delegate to others or to each other. (2) That the reference was not authorized by the Judicature Act, or rules, or the prior Acts and rules conferring jurisdiction upon the judicial officers in Chambers. (3) That the jurisdiction of the Master in Ordinary under the order of reference would be a delegated jurisdiction, as the substitute or deputy of the Master in Chambers, and not the co-ordinate jurisdiction conferred upon his office by the Act. (4) That the order of reference was not therefore warranted by the Dominion or Provincial Acts, and could not be proceeded on.

A judicial officer cannot delegate the discharge of his judicial functions to another, unless expressly empowered so to do.

All that can be referred to an official referee under s. 47 O. J. A., is a question or questions for inquiry and report, and under s. 48 is an issue or issues for trial. The whole action, facts and law cannot be referred.

T. P. Galt, for the petitioner.

RULES OF THE SUPREME COURT OF ONTARIO.

The following Orders have been passed dated December 15th, 1884:—

545. For the purpose of equalizing the business in the several Divisions of the High Court:

From and after the first day of January, 1885, all writs of summons for the commencement of actions shall be issued by the officers who now issue like writs in the Queen's Bench and Common Pleas Divisions of the said High Court of Justice, and shall be issued alternately in the Queen's Bench, Chancery and Common Pleas Divisions of the said High Court. Writs issued by a deputy clerk of

the Crown and Pleas, or a local registrar need not be signed or sealed by the clerk of the process.

546. All proceedings in actions to final judgment shall be carried on in that office in the same county where the writ of summons was issued, in which by the memorandum subscribed on the writ or by the notice of the writ the appearance is required to be entered, except where by any rule of the Court it may be otherwise provided, or where the Court or a Judge shall otherwise direct.

547. The plaintiff or his solicitor shall, on presenting any writ of summons for sealing, leave with the officer a copy of such writ, and of all the endorsements thereon. Such copy shall be signed by or for the solicitor leaving the same, or by the plaintiff himself if he sues in person. When the writ is issued in the Chancery Division of the High Court by the clerk of the process, such copy shall be forthwith transmitted by him to the clerk of records and writs. Where a writ is issued in the said division by a deputy clerk of the Crown and Pleas, such copy shall be forthwith transmitted by him to the deputy registrar, in whose office the appearance is required to be entered.

Marginal rules 21, 25 and 50 are hereby repealed.

548. Rule 420 is hereby amended by adding thereto the following provisions:—"And in addition thereto shall be and hereby is empowered and required to do all such things, transact all such business, and exercise all such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said courts, or any of them, respectively were at the time of the passing of the Acts 33 Vic. (O.), cap. 11, 37 Vic. (O.), cap. 7—the Ontario Judicature Act, 1881—and are now done, transacted, or exercised by any Judge of the said Courts sitting at Chambers, save and except in respect to matters excepted by the sub-section (a) of said rule."

549. Rule 543 is hereby repealed and the following substituted therefor:—"In actions in the High Court of Justice no reference to arbitration or other reference or examination for the purposes of discovery, or examination of a judgment debtor on which fees may be payable otherwise than in law stamps, shall be taken before the Judge of the County Court, or local Judge of the High Court or local Master being also a Judge of the County Court, by whom the order or appointment for such reference or examination has been made.

References in administration matters under General Order 638 of the Court of Chancery, and in partition matters under General Order 648 of the Court of Chancery, and other like references in mortgage actions are excepted from the operation of this rule.

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No. 3.

DIARY FOR FEBRUARY.

1. Sun.....*Septuagesima Sunday.*
2. Mon.....Hilary Sitzings of Com. Law Divisions, H. C. J., begin.
7. Sat.....Hagarty, C.J., C.P., sworn in, 1856.
8. Sun.....*Sexagesima Sunday.*
11. Wed.....Lord Sydenham, Gov.-Gen. of Canada, 1840.
14. Sat.....Hilary Sitzings of Com. Law Divisions, H. C. J., ends.

TORONTO, FEBRUARY I, 1885.

WE publish in another column a very interesting letter from a correspondent in New York as to the legal profession there, and as to how far it can be said to be a good opening for aspiring Canadians. We recommend it especially to the perusal of law students. There is a large crop of them gathered in this year, and as Canadians are very properly highly appreciated in the United States some of them might do well to think over the information given.

WE accidentally heard the other day such an excellent, though indirect compliment paid to the Chancellor, that we cannot resist repeating it for the benefit of our readers. Two of the shorthand reporters were wrangling as to which of them should go on the Eastern Circuit of the Chancery Division. "Why," said a bystander, "what difference does it make to you, which of you goes the Eastern Circuit?" "That's all you know about it," replied the reporters, "the Chancellor's going the Eastern Circuit, and that means a day and a-half's work each day, and no copies of evidence wanted."

RECENT ENGLISH DECISIONS.

PROCEEDING to consider the December number of the Q. B. D., vol 13, pp. 693-878, the first part of it will be found to consist chiefly of bankruptcy cases, and there is nothing which appears to require noting here until *Read v. Anderson*, at p. 779, is reached.

PRINCIPAL AND AGENT—REVOCATION OF AUTHORITY.

This case illustrates the effect which the fact that a revocation of the authority of an agent by his principal may involve the agent, though not in any legal liability, yet in loss of business and great inconvenience, may have as evidence that it was a part of the contract of employment between the principal and the agent, that the authority of the agent should not be revoked under the given circumstances. In this case the plaintiff was a betting agent, and made bets at the request of the defendant, who gave him authority to pay and receive money, but in his own name; and after the bets had been made and lost, the defendant revoked the authority to pay them. The question was whether he had the right so to revoke. Of course the revocation did not involve the agent in any legal liability for the lost bets, because the payment of bets cannot be enforced by law; but it was shown that if the agent failed to pay the bets, he would be unable afterwards to pursue, what Brett, M. R., calls his "objectionable business" as a betting agent. Under these circumstances the majority of the Court of Appeal held the authority to pay could not be revoked. The reasoning of the judgments appears from the following passage in the judgment of

RECENT ENGLISH DECISIONS.

Bowen, L. J., at p. 782:—"It is true that this is a transaction between a principal and an agent; there is a delegation of power to the agent; there is a mandate to the agent; and, subject to certain exceptions, a principal it is said may revoke a mandate which he has given. But there is something in this transaction beyond a mere mandate given or power delegated to an agent. There is a contract of employment between the principal and the agent, which expressly or by implication regulates their relations, and if as part of this contract the principal has expressly or impliedly bargained not to revoke the authority and to indemnify the agent for acting in the ordinary course of his trade and business, he cannot be allowed to break his contract. What was the contract or bargain?" His lordship then refers to the circumstances of the case indicated above and continues: "What is the inference of fact to be drawn as to the true bargain between them? . . . As an inference of fact, it seems to me that it was well understood to be part of the bargain that the principal should recoup his agent, and should not revoke the authority to pay, but should indemnify the agent against all payments made in the regular course of business. . . . There is a great deal of apparent difficulty in this case, because the action relates to betting and wagering; but the contract sued on by the plaintiff is not a wagering contract."

APPELLATE COURT—FINDING OF FACT BY JUDGE.

There is also a *dictum* of Brett, M. R. in this case which it may be well to call attention to. "The learned judge," he says, at p. 781, "has found many of the questions in dispute as questions of fact, and it seems to have been thought that the Court of Appeal cannot dispute his findings; but the Court of Appeal is not bound by the findings of fact by a judge who tries a case without a jury."

MARRIED WOMAN—ACTION FOR TORT—*WELDON V. WINSLOW*, p. 784. VICT. C. 1941, SUB-SEC. 2.

Of the next case, *Weldon v. Winslow*, p. 784, it may be said briefly that it decides that by virtue of the section of the English Married Women's Property Act, 1882, which corresponds to sec. 2, sub-sec. 2 of our Married Women's Property Act, 1884, a married woman can be sued alone for a tort committed before the coming into operation of the Act. It was argued that this was giving the statute a retrospective operation, and affected the husband's right to reduce the damages recovered into possession. But it is pointed out in the judgments that the action was for a personal injury done to the plaintiff, and that according to the law of England the action was always the action of the wife, subject to the right of the defendant to insist on having the husband joined; and the objection as to damages, which the section declares shall be "her separate property," is met in a way indicated by the following passage in the judgment of Bowen, L. J.:—"It is not desirable to affect vested rights, but the words of the section seem to me to alter the capacity of the wife for purposes of procedure rather than to deal with the right of the husband at least, until we come to the provision as to damages, and considering even that provision, I think the words fall rather on the side of the line of statutes dealing with procedure rather than of statute affecting vested rights." It may seem a little difficult, however, to understand how it can be said that if such is the force of the section it does not amount to an interference with vested rights, if damages are thereby made the separate property of the wife, which would otherwise be capable of being reduced into possession by the husband and so becoming his property. And Fry, L. J., though he concurs with the other judges, says:—"I am not insensible to the difficulty of holding that the Act has made damages which before the

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Act might have been reduced into possession by the husband, the separate property of the wife. But the words of the Act are too plain, and there is nothing to confine their operation to actions for torts committed after the Act came into operation." He also expresses his view, which must also have been the view of the other judges, that the rights of the husband are not protected by that section which corresponds to s. 22 of 47 Vict. c. 19, O.

EVIDENCE—PEDIGREE—FACTS CONSTITUTING PEDIGREE.

At p. 818 comes what is probably the most valuable decision in the number, namely *Haines v. Guthrie*, first because it is a categorical decision of the Court of Appeal that though in cases of pedigree hearsay evidence is, contrary to the general rule, admissible to prove pedigree, yet nevertheless hearsay evidence is not admissible to prove such facts as birth, death, and marriage for purposes other than proving pedigree, although these are the facts which constitute a pedigree; and, secondly, because it contains a long judgment of Stephen, J., discussing the law as to the admissibility of hearsay evidence in pedigree cases. The facts of the case are simple. The action was for the price of certain horses, sold by the plaintiff to the defendant, and the defence was that at the time of sale the defendant was under twenty-one years of age. The evidence of this fact tendered was a declaration in an affidavit by the deceased father of the defendant as to the date of the defendant's birth. The question was whether this evidence was admissible. The Court of Appeal, affirming the decision of the Queen's Bench Division, held that it was inadmissible, as Bowen, L. J., says, p. 831:—"The exact point is that in such an action as the present, and on such an issue, the declaration of a deceased person is not admissible; for the question at issue is not a question of family, but merely as to the age of a particular young man:" or,

in the words of Brett, M. R. :—"What the family of the defendant is is immaterial; whose son he is is immaterial; whether he is a legitimate or an illegitimate son is immaterial, and whether he is an elder or a younger son is immaterial. No question of family is raised in the case." It may be remarked that Brett, M. R., cites at length the passage from *Sturla v. Freccia*, 5 App. Cas. 623, wherein Lord Blackburn enumerates the exceptions to the general rule that hearsay evidence is inadmissible, and adds at p. 830:—"I think Lord Blackburn intended to make an exhaustive definition of the exceptions to the rule against the admission of hearsay evidence, and he distinctly states that "in questions of pedigree" the statements of deceased members of the family "are evidence to prove pedigree."

CONTRACT—ARBITRATION CLAUSE—"DISPUTE ARISING ON THIS CONTRACT."

The last case necessary to notice here in this number is *Hutcheson & Co. v. Eaton & Son*, p. 861. In this case it appeared that in a written contract by which the defendants sold to the plaintiffs a cargo of cotton-seed cake of a specified quality, there was a clause that "should any of the above goods turn out not equal to quality specified, they are to be taken at an allowance, which allowance, together with any dispute arising on this contract, is to be settled by arbitration." The cargo proved of inferior quality, and an arbitration was had to determine the liability of the defendants. The arbitrators decided by their award that the defendants were not liable, inasmuch as it appeared that the defendants signed the contract with the addition of the word "brokers," and, after the contract was signed, named their principals; and the arbitrators found by their award that a custom existed that a broker, upon naming his principals, ceased to be liable on the contract. The Court of Appeal now held that this award was

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no defence to an action brought to recover damages in respect of the inferior quality of the cargo, inasmuch as by their finding as to the custom the arbitrators had exceeded their jurisdiction. Brett, M. R., says at p. 866:—"Now the question is, had they (the arbitrators) any jurisdiction to inquire into the existence of that custom or not? Can a question whether a custom is to be added to the written contract, and thus to control the meaning of this contract, be held to be "a dispute arising upon this contract?" It seems to me that it cannot. . . . The only matter which they had authority to decide was any question arising on the contract itself; but they have taken on themselves to decide what the contract was, in order to give themselves jurisdiction to decide what the rights of the parties were. As far as I am aware, no case has decided that an arbitrator who has authority to decide a dispute arising on such a contract as this which is specified and described, has also authority to say what the contract is, in this sense, that he has a right to add something to the contract which is not expressed in it. I think he cannot do that. What the arbitrators have really done here, is by their own decision to attempt to give themselves a jurisdiction which otherwise they had not." Bowen, L.J., speaks to the same purport. Fry, L.J., however, dissents from his two colleagues. He says, p. 870:—"It appears to me that before an arbitrator can determine a dispute upon the contract he must be able to determine what is the contract, because otherwise it is impossible to determine the rights of the parties on the contract."

SIGNING CONTRACT AS "BROKERS."

Another point decided in this case requires notice. The defendants signed the contract in question thus:—"W. Eaton & Son, brokers," and it was argued that they, having signed as brokers, were not personally liable. The M. R., however,

says as to this:—"According to the authorities, as I understand them, when the contract is drawn up in this way, and the signature is of the name of the person, with "brokers" added, and the contract is not signed "as brokers," they are personally bound; for it is said to be a signature on their own behalf, and the word "brokers" is only a description. And, as to this, both Bowen, L.J., and Fry, L.J., appear to be of the same opinion.

A. H. F. L.

SELECTIONS.

UNDERTAKINGS AS TO DAMAGES

THE case of *Griffith v. Blake*, 53 Law J. Rep. Chan. 965, reported in the November number of the *Law Journal Reports*, decides a point of some importance in the law injunctions, and at the same time throws some light on the rather obscure subject of the undertaking as to damages given upon interlocutory injunctions. The plaintiffs in the action were a firm of solicitors at Cardiff, who unfortunately had very noisy neighbours in the shape of certain iron-workers. The process technically known as "blocking tin plates" was found seriously to distract the attention of those engaged in the drafting of deeds and the composition of letters to clients. A motion was accordingly made to restrain the operations of the neighbours as a nuisance, and Mr. Justice Chitty gave an interim injunction on the plaintiff undertaking to pay damages if the Court should think the defendants had sustained loss by the injunction. A motion was made in the Court of Appeal to rescind the order, and the appellant's counsel argued that if it should turn out that Mr. Justice Chitty was wrong in his law and that the tin-blocking was not legally a nuisance, the defendant would not be able to recover damages, and therefore the injunction ought to be taken off. He relied, as an authority for this proposition, on the case of *Smith v. Day*, L. R. 21 Ch. D. 421. Thereupon Lord

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Justice Cotton, who was a party to the judgment in that case, disclaimed any concurrence in the view on that point expressed by the late Master of the Rolls. The learned Lord Justice repeated this view in giving judgment, and Lords Justices Baggallay and Lindley concurred. The appeal against Mr. Justice Chitty was affirmed on the ground that there was sufficient evidence of a nuisance, and the opinion expressed as to the undertaking in damages was only *obiter dictum*; still it was an opinion of great weight, and, at all events, destroys the authority of the *dictum* of the late Master of the Rolls already cited. The case, it is to be observed, was not reported in the *Law Journal Reports*, and ought not to have been reported at all, as it contained a mere *obiter dictum* of one judge from which another judge dissented, while the third judge, Lord Justice Brett, was neutral.

In the case referred to Sir George Jessel gave the history of the undertaking as to damages. He said that it was the invention of Lord Justice Knight-Bruce, and was originally only inserted in *ex parte* injunctions. It would, we think, have been better if it had never been extended. The undertaking for damages inserted in an *ex parte* application may be of use to protect the Court from misrepresentation, but to insert it when the Court has had the opportunity of hearing both sides seems to us to be totally out of place and contrary to the general principles by which the judgments of Courts ought to be guided. The Court ought to have sufficient confidence in its own judgment to give that judgment unconditionally, and ought not to call upon one of the parties to guarantee that its decision is right. If this is to be done in the case of injunctions, there is no reason in principle why it should not be done in any kind of case, and why a successful plaintiff should not always undertake to pay damages to the unsuccessful defendant in case it should turn out that, after all, the successful party ought not to have been successful. It is difficult to see how the practice which has sprung up can be defended in principle. However, the practice exists, and upon an interlocutory injunction, whether obtained *ex parte* or otherwise, the plaintiff always undertakes "to abide by any order the Court may make as to

damages in case the Court should thereafter be of opinion that the defendant shall have sustained any by reason of the order which the plaintiff ought to pay." The case supposed is that of an interlocutory injunction being granted *inter partes* by the judge, and afterwards the judge alters his mind or the Court of Appeal reverses him, so that it appears that the injunction ought never to have been granted. In that case can it be said that the Court ought not "to be of opinion that the defendant has sustained damages?" If the defendant has suffered loss from the injunction, which ought never to have been granted, it is clear that he has sustained damages, and the Court ought to estimate them. The basis of the undertaking is that the injunction is the act of the party, and the party which illegally inflicts loss on another ought to be made to pay damages.

These considerations appear to us to be unanswerable in favour of the opinion now expressed by the Court of Appeal. To limit the application of the undertaking to the cases suggested by the late Master of the Rolls would be to disregard the terms of the undertaking. Sir George Jessel supported his opinion by remarking that "it is the duty of the judge to decide according to law, and the plaintiff cannot be considered as undertaking to be answerable for his not doing so." This appears to us to be an irresistible reason why the undertaking as to damages should not appear in the order *inter partes*, or why its terms should be modified, but to be no reason why according to the present practice the ultimately unsuccessful party should have to pay damages to the successful for having been partially successful. In fact, the practice, having gone so far, ought to go further. Why should not an undertaking in damages be given in respect of a final injunction when there is an appeal? It may be that the facts are not so fully ascertained on the interlocutory application as at the trial, but this cannot be said of the law. If there is any real doubt about the law the judge ought not to make an order for an interlocutory injunction at all, and his knowledge of law at the interlocutory hearing is the same as his knowledge of law at the trial. While, therefore, we agree with the Court of Appeal in its interpretation of the undertak-

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ing as now given, we cannot help thinking that effect ought to be given to the views of the Master of the Rolls by confining the undertaking to cases in which there is a misrepresentation or suppression on the part of the applicant.—*Law Journal*.

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LYELL V. KENNEDY.

Imp. O. 31, r. 12 (1883)—Ont. R. 222.

Discovery and production—Attempt to falsify claim for privilege—Affidavit of documents.

[27 Ch. D. 1.

Where in an answer to interrogatories, the party interrogated declines to give certain information on the ground of professional privilege, and the privilege is properly claimed in law, the Court will not require a further answer to be put in, unless it is clearly satisfied, either from the nature of the subject-matter for which privilege is claimed, or from statements in the answer itself, or in documents so referred to as to become part of the answer, that the claim for privilege cannot possibly be substantiated.

The mere existence of a reasonable suspicion which is sufficient to justify the Court in requiring a further affidavit of documents is not enough when a claim for privilege in an answer to interrogatories is sought to be falsified.

A waiver of privilege in respect of some out of a larger number of documents; for all of which privilege was originally claimed, does not preclude the party from still asserting his claim of privilege for the rest. Although *prima facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged when it has been made or obtained by the professional advisers of a party for his defence to the action, and is the result of the professional knowledge, research, and skill of those advisers.

LAWSON V. VACUUM BRAKE COMPANY.

Imp. O. 37, r. 5—Ont. r. 285.

Evidence—Examination of witnesses abroad.

Where it is sought to have a material witness examined abroad and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must show clearly that he cannot bring him to this country to be examined at the trial.

[27 Ch. D. 137.

BAGGALLAY, L.J.—There is no doubt the Court has jurisdiction to grant the application, but on what principles is that jurisdiction to be exercised? The Court, in considering an application of this nature, will no doubt take into consideration the difference between the expense of the witness being brought over to this country and of his being examined abroad, and the inconvenience, apart from the expense, which may be occasioned by compelling him to leave his occupation in a foreign country and come over to this country to be examined. But it appears to me that if an application is made (whether it is made by the plaintiff or by the defendants) for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the Court that it is for the interest of justice that the witness should be examined abroad.

COTTON, L.J.—But I think that in a case of this sort, where it is important that the witness should be examined in Court, a heavy burden lies on the party who wishes to examine him abroad, to show clearly that he cannot be reasonably expected to come here.

PLATT V. MENDEL.

Foreclosure action—Mortgage—Subsequent incumbrancers—Period of redemption.

In a foreclosure action by the transferee of the first mortgage, the statement of claim alleged that the defendants other than the mortgagor claimed to have some charge upon the mortgaged premises subsequent to the plaintiff's charge. None of the defendants, including the mortgagor, put in a defence or appeared at the bar.

Held, that the plaintiff was entitled to a foreclosure judgment on the pleadings, allowing one period for redemption as against all the defendants.

[27 Ch. Div. 246.

CHITTY, J.—It is undoubted that in a simple case between mortgagor and mortgagee, and where there are no other incumbrances, the mortgagor has, whether he be defendant in a foreclosure action or plaintiff in a redemption action, six months, and six months only, to redeem. I put aside, of course, the cases in which by indulgence

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he is allowed to come in after default made, and even sometimes in those peculiar cases where, after order absolute, he is allowed to come in, as in *Campbell v. Holyland*, 7 Ch. D. 166; but the established rule is that a mortgagor has six months, and six months only, to redeem, and undoubtedly, to my mind, it is an anomaly to say that a mortgagor by any dealings with the equity of redemption subsequent to the first mortgage should be able to gain for himself a right to a further time to redeem.

... If, however, the defendants in a foreclosure action have put in a defence or appeared at the bar, and have proved their incumbrances, and there is no question of priority between them, it does appear that the course of the Court has been to make a judgment allowing successive periods for redemption, which, when examined in principle, will be found to be a judgment, not only in favour of the plaintiff, but a judgment as between the co-defendants. In order, to my mind, for the Court properly to make such a judgment as that, the defendants must appear, and either prove or have sufficient admission of their incumbrances in order to entitle the defendants asking for it to such a judgment as between the co-defendants. In my opinion, the mortgagor is not entitled to ask at all for such a judgment. It is the right of the *puisne* mortgagees.

HAMPDEN V. WALLIS.

Order for payment into Court—Admission—Evidence.

Trust funds may be ordered to be brought into Court by the trustee, an accounting party, upon admissions contained in letters written before action brought that he has received the money, and a recital to that effect contained in the settlement, his execution of which as trustee has been proved, although there is no formal admission in his pleadings or affidavits that he has received and holds the money.

[27 Ch. Div. 251.]

CHITTY, J.—The late Master of the Rolls, in *London Syndicate v. Lord*, 8 Ch. D. 84, held that one mode of admission was as good as another. The old practice was not to order money into Court unless an admission was to be found in the answer. That practice was modified, and admissions in the proceedings were held to be sufficient.

LUMB V. BEAUMONT.

Imp. O. 50, r. 3—O. J. A. r. 398.

Inspection of property—Interlocutory order.

Under the above rules the Court has power to make an interlocutory order before trial, giving liberty to a plaintiff to enter upon land belonging to the defendant, and to excavate the soil thereof for the purposes of inspection.

[27 Ch. Div. 356.]

FUSSELL V. DOWLING.

Imp. O. 17, r. 4 (1883)—O. J. A. r. 385.

Revivor—Discretion of Court—Expiration of time limited for appealing—Special circumstances.

By a marriage settlement the property of the wife was vested in trustees upon trust for the wife, for her separate use, and in case there should be no issue (which event happened) for the wife, her executors, administrators, and assigns, if she survived her husband, but if she died in his lifetime, then for the husband for his life, and subject thereto for the wife's next of kin. The marriage was dissolved in 1871, and in 1872 the wife, in a suit instituted by her against her late husband and the trustees of the settlement, obtained a decree that she was absolutely entitled to the property comprised in the settlement. By her will, dated in 1877, the wife disposed of the property as if it was her own absolutely, and died in 1881, in the lifetime of her late husband.

Held, in the absence of special circumstances, that the next of kin of the wife were not now entitled to an order to revive the suit or to carry on proceedings thereon for the mere purpose of appealing against the decree of 1872.

[27 Ch. Div. 237.]

CHITTY, J.—(After reading the terms of the above rule) it seems to me that the Court has a discretion in making the order, and the applicant is bound to show that it is either necessary or deniable for the purpose of working out the decree. In this case the decree admittedly has been worked out, and a transfer of the fund has been made years ago. The only object, therefore, is that there may be an appeal from the decree. It appears to me, having regard to the observations which fell from the late Master of the Rolls in *Curtis v. Sheffield*, 21 Ch. D. 1, that in cases of this kind, where the only object of a party asking for an order is to appeal, and where there are no special circumstances in the case, where, for instance, there is no suggestion of collusion, or fraud, or the like, and where there is no irregularity, as there was in the case of *Walmsley v. Foxhall*, 1 DeG., J. & S. 451, where the decree had erroneously dealt with future rights, the right rule to be observed is this, that such an order should not be made after the expiration of the time which is limited now for an appeal, namely, one year. It is not necessary to go so far as that in the case which I am dealing with, because a period of something like twelve years has elapsed since that decree was made.

I think that the application ought not to succeed; that it certainly is not "necessary" nor, in my opinion, "desirable" that such an order should be made.

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NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**SUPREME COURT OF CANADA.**

Ontario.]

MERCHANTS' BANK V. KEEFER.*Will—Construction of—Contingent interest.*

The question argued on this appeal was as to the construction of a particular devise contained in the will of T. McK., whereby the testator gave a certain parcel of land to one of his sons. T. McK., the testator, having previously given all his estate, real and personal, to trustees in trust for his wife for life or during her widowhood, made the devise in question as follows:—"In trust also that at the death or second marriage of my said wife, should such happen, my son Thomas, if he be then living, shall have and take lot number 1, etc., which I hereby devise to him, his heirs and assigns, to and for his and their own use forever." The testator then gave to his other sons and to his daughters other real estate in fee. He directed that all the said devises "in this section of my will mentioned and devised" should take effect upon and from the death or marriage of his wife, and not sooner.

He gave all his other lands in trust for sale, the rents and proceeds to be at his wife's disposal while unmarried, and after her death or marriage all his personal property and estate remaining was to be equally divided among his children: provided always, that in the event of any children dying without issue before coming into possession of his or her share "of the property or money hereby devised or bequeathed," the share of such child should go equally among the survivors and their issue, if any, as shall have died leaving issue. The residuary clause was as follows:—"All my other lands, tenements, houses, hereditaments, and real estate," etc.

Held (RITCHIE, C.J., and FOURNIER, J., dissenting and reversing the judgment of the Court below) That the interest devised to Thomas was contingent upon surviving his mother.

Per STRONG, J.—That as a devise of other lands

includes undisposed of interests in lands, in which partial interests or contingent interests which have failed have been previously given, the devise of lot number 1 at Thomas' death formed part of the residuary lands of the estate subject to the provisions as to survivorship and substitution mentioned in the will.

Mrs. E. Keefer, one of the testator's children, having died in the lifetime of her mother, the substitution in favour of her children was restricted to the children who survived their mother, and they became entitled absolutely among themselves as tenants in common (R. S. Ont. ch. 105, sec. 11) to an equitable estate in fee simple in remainder expectant on the death or second marriage of the testator's widow in one undivided fourth part of said lot number 1. And that upon the death of the said testator's widow, the testator's children, Annie Keefer, Christine McKay and J. Clark, the three surviving daughters of the testator, became entitled absolutely to an equitable estate in the remaining three undivided fourth parts of lot 1 as tenants in common in fee simple.

Appeal allowed, with costs of all parties to be paid out of the estate of testator.

Robinson, Q.C., and Gormully for appellants.

S. H. Blake, Q.C., and McIntyre for respondents.

Ontario.]

PETERKIN V. MCFARLANE ET AL.*Purchase with agreement to resell—Registry Act notice.*

P. filed a bill against McF. *et al*, claiming a right of redemption to a certain piece of land sold absolutely in form to McF., and subsequently resold by McF. to McK. and by the latter to B. By his answer to this bill B. admitted that the right of redemption had been given, and by amended answer set up the Registry Act and a *bona fide* purchase without notice. The Judge who tried the case found that the redeemable character of the transaction was admitted by the pleadings and proved, and that as a matter of fact the evidence established clearly that the parties had actual notice of P.'s right of redemption. This finding on this question of fact was affirmed by the Court of Appeal, and on appeal to the Supreme Court of Canada it was *held* (GWYNNE, J., dissenting) that there was evidence to justify the conclusion arrived at by the Courts below, that the parties had actual

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notice, and therefore the registry title did not defeat P.'s right to redeem the property.

Appeal dismissed with costs.

Moss, Q.C., and Scane for appellants.

Atkinson for respondent.

Ontario.]

PECK V. POWELL AND POWELL V. PECK.

Sale of patent—Specific performance—Renewal.

By an agreement dated 1st June, 1877, Powell undertook to assign his interest in his pump patents to Peck *et al.*, for the counties of York, Peel, Halton, Simcoe, and Ontario; and by deed of same date he granted, sold, and set over to P. *et al.* "all the right, title, and interest which I have in the said invention, as secured by me by said Letters Patent for, to, and in the said limits of the County of York," etc. The deed has an *habendum* to the full term for which the said Letters Patent are granted.

The deed was not completely executed till the 23rd June, 1877, and the patent expired on the 19th July, 1877. Powell renewed the patent in his own name for a further term. On a bill filed by Powell asking for a decree for payment of purchase money secured by a mortgage, or in default for a sale of the lands mortgaged, and on another bill filed by Peck *et al.*, praying that Powell might be ordered to transfer to them the patent for the residue of the renewed term of the patent, and that Powell be restrained from attempting to levy the purchase money until he should have done so.

Held (varying the judgments of the Court below), that Powell had parted with all interest, so far as the five counties were concerned, and that at the time of the expiration of the patent P. *et al.* were the legal holders under the statute of the patent for the said counties, and that P. *et al.* are now the legal holders, and as such entitled to a decree affirming their right to the patent in the said five counties to the full end of the further term granted to Powell; and that as regards Powell, he was entitled to recover on his mortgage.

Appeal in case of *Peck v. Powell* allowed with costs, and in the case of *Powell v. Peck* dismissed with costs.

Hector Cameron, Q.C., and Fitzgerald for appellants.

McCarthy, Q.C., and Moss, Q.C., for respondent.

Ontario.]

MOFFATT V. MERCHANTS' BANK OF CANADA.

Deed—Construction of—Misrepresentation.

G. M., a man of education, well acquainted with commercial business, executed a certain agreement and bond to pay certain sums of money in certain events to the defendants. The agreement recited *inter alia* that in consideration of this security the bank had agreed to make further advances to the firm of M. Bros. and Co., joint obligors and parties to the agreement, and that the agreement was executed to secure the bank in case there should be any deficiency in the assets of the firm, or in the value of the property comprised in a mortgage, and to secure the bank from ultimate loss. The agreement contained also a proviso that if the firm should well and truly pay their indebtedness, then the bond and agreement should become wholly void. In a suit brought upon the said agreement against G. M., alleging a deficiency in the assets of the firm and indebtedness to the bank, G. M. pleaded that the agreement had been executed by him on representations made to him by one of his co-obligors that it was to secure the bank against any loss which might arise by reason of the refraining from the registration of the mortgage, or by reason of any over-valuation of the property embraced in the mortgage and not otherwise.

Held (affirming the judgment of the court below, Gwynne, J. dissenting), that G. M. was bound by the execution of the documents, and was liable upon them, according to their term and effect, viz., that the security was given to cover any possible *ultimate* loss there might be on the account of the firm.

Appeal dismissed with costs.

McCarthy, Q.C., and Ferguson, for appellant.

C. Robinson, Q.C., and J. P. Smith, for respondents.

Ontario.]

WHITE ET AL. V. NELLES.

Possession fraudulently obtained—Estoppel—Tax sale—33 Vict. ch. 23, Ont.

N. was assignee in insolvency of H., who bought from the purchaser at sheriff's sale the north part of a lot, called lot 1, in one survey,

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and lot 4 in another of 100 acres more or less, and which had been assessed variously as "number 1, north half," etc., "number 1, north part," etc., and "broken lots 1 and 4." H. leased to T., and put him in possession, and had some small buildings put on the land. Subsequently, O., one of the defendants, went to T. while he was still in possession, and by fraudulent representations induced T. to leave the place, whereupon O. went in and occupied, claiming under defendant W., who, he alleged, was owner in fee simple of the land, and claimed title as his tenant. W., by his answer, adopted O.'s possession, and claimed under conveyance from the Crown, but failed to prove his title.

Held (affirming the judgment of the Court below), that the possession of O. having been fraudulently obtained, defendants were estopped from disputing the plaintiff's title.

Per GWYNNE, J.—That as the defendants had failed to prove that the taxes had been paid before the sheriff's sale, the Ontario statute, 33 Vict. ch. 23 has removed all errors and defects, if any there were, which would have enabled the true owner, at the time of the sale, to have avoided it, and that pursuant to the provisions of ch. 40, sec. 87, R.S.O., the plaintiff was entitled to recover possession of the land in question in virtue of the title asserted by him in his bill and to have execution therefor.

Appeal dismissed with costs.

Bethune, Q.C., for appellants.

Blake, Q.C., and *Lash*, Q.C., for respondent.

Quebec.]

LA COMPAGNIE DE VILLAS DU CAP
GIBRALTAR V. HUGHES ES QUAL.

Building Society—Purchase of land—Intra vires—
Ch. 69, Con. Stat. L.C.

Le Cie. de V., a building society incorporated under ch. 69 Con. Stat. L.C., by its by-laws, on the 21st August, 1874, declared that the principal object of the society was to purchase building lots and to build on such lots cottages costing about \$1,000 each for every one of its members.

In order to attain its object the company, through its directors, obeying the instructions of the shareholders, on the 7th October, 1874,

purchased the particular lots described in the by-law, and contracted for the building of twenty-four cottages at \$1,250 each, the amount that each of the shareholders had agreed to pay. A year elapse, during which the cottages are built and drawn by lot for distribution among the members. On the 11th October, 1875, the vendors of the lots and contractors for the building of the cottages, borrowed money from the D. B. Society (respondents), and transferred to them the same as collateral security the money sued them by the appellants in virtue of the deeds of purchase and building contract. The appellant company accepted the transfer and paid some moneys on account, and finally a deed of settlement *acte de règlement de compte* was executed between the two companies upon which was based the suit by H., the respondent, against the appellant company.

The question argued on this appeal was whether the purchase of the lots and contract for building entered into by the directors was *ultra vires* of the appellant company.

Held (affirming the judgment of the Court below, STRONG and GWYNNE, JJ., dissenting), that as the transaction in question was for the purpose of carrying out the objects of the society in strict accordance with its rules, it was not *ultra vires*.

Appeal dismissed with costs.

Beique, for appellants.

Globensky, Q.C., for respondents.

Quebec.]

SOULANGES CONTROVERTED ELECTION
CASE.

CHOLETTE V. BAIN.

Dominion Elections Act, 1874, sec. 96—Intimidation—Undue influence—Conspiracy between deputy-returning officer and respondent's agent to interfere with franchise by marking ballots—Effect of—Election void.

In an election petition it was charged that the respondent personally, as well as acting by C. A., C. by D. P., others, his agents, did undertake and conspire to impede, prevent and otherwise interfere with the free exercise of the franchise of certain voters; and that in furtherance of a premeditated scheme, which the respondent and his agents well knew to be

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illegal, they did, in fact, impede, prevent and interfere with the exercise of the franchise of certain voters by getting their ballots marked, rendered identifiable, and consequently void, whereby the franchise of these voters was unjustifiably interfered with.

At a previous election the respondent had been defeated by a majority of three votes, and the election having been contested was set aside, and certain voters were reported by the judge as having been guilty of corrupt practices, but had not been found guilty of such corrupt practices under sec. 104 of the Dominion Elections Act, 1874.

At a public meeting before the election, A. C. C., the respondent's agent, to intimidate these persons and prevent them from voting, in a speech made by him, threatened them with punishment if they voted; and subsequently printed notices to the same effect were sent to these voters.

On the polling day D. P., who had been appointed deputy-returning officer on the distinct understanding with, and promise made to, the returning officer that he would not mark the ballots of these voters, consulted with A. C. C., and on his advice, and in collusion with him, marked the ballots of certain of these voters.

Held, That the election was void by reason of the attempted intimidation practised by A. C. C., the respondent's agent, and by reason also of the conspiracy between the said agent and the deputy returning officer to interfere with the free exercise of the franchise of voters, violations of sec. 95 of the Dominion Elections Act, 1874, which are corrupt practices under section 98 of the said Act.

Appeal allowed with costs.

Geoffrion, Q.C., and *Monk*, for appellant.

Ouimet, Q.C., and *Cornellier*, for respondent.

*MORSE V. MARTIN.

Trade mark—Infringement of—Resemblance to deceive ordinary purchasers necessary.

The appellant, proprietor of a trade mark registered in Canada, and used by him on an article of his manufacture styled "The Rising Sun Stove Polish," the mark in question consisting of a printed vignette or picture of a rising sun above a body of water, with the words "The Rising Sun Stove Polish" printed

across the picture, sued one C. M. (the respondent) for \$5,000 damages for infringement of his trade mark. At the trial there was evidence that C. M. manufactured and sold in Canada a stove polish put up in packages bearing a vignette or picture of an orb or sun, with the words "Sunbeam Stove Polish" printed. One article was put up compact and the other in powder. The packages were not alike in shape or colour—one was put up in small oblong cubical blocks, in red wrappers, with the device of a well developed sun rising above a body of water, whilst the other was put up in cylindrical tin boxes, in yellow wrappers, with a small sun about the centre of the label, and had printed on it the name of the manufacturer.

Held (affirming the judgments of the Courts below), that plaintiff had failed to prove that any fraudulent imitation of his trade mark had been practised, or that one had been used having a resemblance to it, calculated to deceive or mislead ordinary purchasers purchasing with ordinary caution.

Appeal dismissed with costs.

Kerr, Q.C., for appellant.

Robertson, Q.C., for respondent.

THE QUEBEC WAREHOUSE COMPANY V. THE TOWN OF LEVIS.

44 & 45 Vict. ch. 40, sec. 2—Construction of—
By-law—Ultra vires—Injunction.

Under 44 & 45 Vict. ch. 40, sec. (P. Q.), passed on a petition of the Quebec Central Railway Company, after notice given by them, asking for an amendment of their charter, the town of Levis passed a by-law guaranteeing to pay to the Quebec Central Railway Company the whole cost of expropriation for the right of way for the extension of the railway to the deep water of the St. Lawrence River over and above \$30,000. Appellants being ratepayers of the town of Levis, applied for and obtained an injunction to stay further proceedings on this by-law on the ground of its illegality. The proviso in sec. 2 of the Act, under which the corporation of the town of Levis claimed the by-law to be authorized is as follows:—"Provided that within thirty days from the sanction of the present Act, the corporation of the town of Levis furnishes the said Company with its

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valid guarantee and obligation to pay all excess over \$30,000 of the cost of expropriation for the right of way." By the Act of incorporation of the town of Levis, no power or authority is given to the corporation to give such guarantee. The statute 44 and 45 Vict. ch. 40, was passed on 30th June, 1881, and the by-law forming the guarantee was passed on the 27th of July following.

Held (reversing the judgment of the Court of Queen's Bench, Appeal side, P. Q., and restoring the judgment of the Superior Court), that the statute in question did not authorize the corporation of Levis to impose burdens upon the municipality which were not authorized either by their Acts of incorporation or other special legislative authority, and therefore the by-law was invalid and the injunction must be sustained.

Irvine, Q.C., for appellants.

Languedoc, for respondents.

STEVENS V. FISK.

Divorce in United States—Validity of, in Canada—Matrimonial domicile—Married Woman—Right to sue as femme sole—When—Art. 14 C.C.P.—Comity of nations.

In 1871 the parties F. and S. being native American citizens were married in the State of New York, where they then had their domicile. In 1872 they both came to Canada and established their domicile at Montreal. At the time of the marriage S. (the appellant) was possessed of a considerable fortune in her own right, which soon after her marriage she entrusted to the care and custody of her husband. In 1876 S. left her husband to return to the United States, and in 1880 she commenced a suit in the Supreme Court of New York against her husband for divorce for cause of adultery. It was served upon F. at Montreal. He appeared by attorney, and after proof, a decree of divorce was pronounced.

In an action brought by S. as a *femme sole* against F. for an account of her fortune, she set forth the facts of the marriage and of the divorce, and at the trial it was proved that by the laws of the State of New York the husband had no control over the separate property of his wife, and that she continued to exercise

her rights over her own property the same as if she were a *femme sole*.

Held (reversing the judgment of the Court *a quo*, STRONG, J., dissenting),

1st. *Per* FOURNIER, HENRY and GWYNNE, JJ., that it was not necessary for S., a foreigner, to obtain the authorization required by Arts. 176 or 178 C. C., in order to sue (*ester en jugement*) as in her own country such authorization is not necessary. (Art. 14, C.C.P.)

2nd. *Per* RITCHIE, C.J., and HENRY and GWYNNE, JJ., that F. having appeared before and submitted to the jurisdiction of the Supreme Court of New York, the matrimonial domicile of both parties, and that Court having, as appears by the evidence, jurisdiction to entertain the suit, the decree of divorce obtained by S. was valid and binding on the parties here by comity of nations.

Appeal allowed with costs.

Laflamme, Q.C., and *Laflaur*, for appellants.

Kerr, Q.C., for respondent.

New Brunswick.]

J. D. LEWIN ET AL. V. GEORGIANA WILSON ET AL.

Statute of limitations—Ch. 84 s. 40, and ch. 85 ss. 1 and 6 Con. Stat. N.B.—Covenant in mortgage deed—Payment by co-obligor.

J. H. borrowed \$4,000 from M. C. on the 27th September, 1850, at which date J. H. and J. W. gave their joint and several bond to M. C., conditioned for the re-payment of the money in five years, with interest quarterly in the meantime. At the same time, and to secure the payment of the \$4,000, two separate mortgages were given, one by J. H. and wife on H.'s wife's property, and one by J. W. and wife on W.'s property. Neither party executed the mortgage of the other. The mortgage from J. W. contained a provision that upon repayment of the sum of £1,000 and interest by J. W. and J. H., or either of them, their, or either of their heirs, executors, etc., according to the condition of the bond above mentioned, then the said mortgage would be void. A similar provision being inserted in the mortgage from J. H. The bond and mortgages were assigned to L. et al. (the appellants) in 1870, and the principal money has

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never been paid. J. W. died in 1858, and by his will devised all his residuary real estate, including the lands and premises in the above mentioned mortgage to G. W. (one of the respondents) and others. J. W., in his lifetime, was, and since his death, the respondents, have been in possession of the premises so mortgaged by J. W., nor any person claiming by, through, or under him, ever paid any interest on said bond and mortgage, nor gave any acknowledgment in writing of the title of M. C. or her assigns. J. H., the co-obligor, paid interest on the bond from its date to 27th March, 1879.

On 20th January, 1881, under Con. Stat. N. B. ch. 49, a suit of foreclosure and sale of the premises mortgaged by J. W. was commenced in the Supreme Court of New Brunswick in equity, and the court gave judgment for the respondents.

On appeal to the Supreme Court of Canada, *Held* (affirming the judgment of the court below, STRONG, J. dissenting), 1. That all liability of J. W.'s personal representatives, and of his heirs and devisees to any action whatever upon the bond was barred by secs. 1 and 6 of ch. 85 Con. Stat. N.B., although payment by a co-obligor would have maintained the action alive in its integrity under the English Statute, 3 and 4 Wm. IV., ch. 42.

2. That the right of foreclosure and sale of the lands included in the J. W. mortgage was barred by the Statute of Limitations in real actions, Con. Stat. N.B., ch. 84 sec 40.

Per GWYNNE, J.—The only person by whom a payment can be made or an acknowledgment in writing can be signed so as to stay the currency of the Statute of Limitations to a point which, being reached, frees the mortgaged lands from all liability under the mortgage, must be either the original party to the mortgage contract, that is to say, the mortgagor or some person in privity of estate with him, or the agent of one of such persons; and that moneys paid by J. H. in discharge of his own liability had none of the characteristics or quality of a payment made under the liability created by W.'s mortgage.

Appeal dismissed with costs.

Weldon, Q.C., for appellants.

Dr. Tuck, Q.C., and *Millidge*, for respondents.

Manitoba.]

LYNCH v. WOOD.

Vendor and purchaser—Agreement—Construction of—Consideration—Second mortgage.

W. agreed to sell to L., and L. agreed to purchase a messuage and land for \$4,800, and W. accepted in part payment a mortgage on another parcel for the sum of \$2,500. The mortgage on its face appeared to be a first mortgage, but it was in reality, however, made subsequent to another mortgage for a large amount. In an action on the agreement for the purchase of the said land, it was admitted that the mortgage was not a first mortgage upon the land described in it, and that nothing was said upon the subject, and that W. would be damaged by having to take the mortgage as a second mortgage if he was entitled to a first mortgage.

Held (affirming the judgment of the Court below), that W. was entitled to a good and valid mortgage, and that on the admissions in evidence he was entitled to a verdict.

Appeal dismissed with costs.

McCarthy, Q.C., for appellant.

Christie, for respondent.

Nova Scotia.]

PROVIDENCE WASHINGTON INSURANCE
COMPANY v. CHAPMAN.

Marine insurance—Policy issued by foreign corporation—Agent—Countersigning—Proof of agency—Con. Stat. c. 46, sec. 16—Prior insurance clause—Meaning of words "premises hereby assured"—Insurance on freight—Whether came within clause—Warranty not to load more than registered tonnage with stone or ore without consent of agent—Verbal consent of agent—Whether sufficient.

A policy of insurance of a foreign corporation declared that it should not be valid unless countersigned by R., the company's agent at St. John, N.B. In an action on the policy, proof that it was countersigned by R., as agent, and issued to the plaintiff on his application, and that he had previously dealt with R. as agent of the company, and received a policy from him purporting to have been issued by the company and countersigned by R., as such agent, is sufficient evidence under the Consol. Stat. c. 46, sec. 16 to prove that R. was the accredited agent of the company, and that the policy was executed by them.

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Plaintiff insured \$5,000 on a vessel valued in the policy at \$40,000. The policy stipulated that if the assured had made any prior insurance, the underwriters should be answerable only for so much as such prior insurance was deficient towards fully covering the premises thereby insured. The plaintiff's interest in the vessel amounted to \$15,000, and he had prior insurance to the extent of \$5,350; there was also insurance, by other persons, on the freight and disbursements of the vessel, and on advances made to the plaintiff.

Held (affirming the judgment of the Court *a quo*).

(1) That the words "premises hereby insured," meant the plaintiff's interest in the vessel; and that as the value of his interest exceeded the amounts both of the prior insurance and of the sum insured by the policy sued on, he was entitled to recover the whole of the latter sum.

(2) That the insurance on freight, etc., did not come within the prior insurance clause of the policy.

By the terms of a policy of insurance, a vessel was warranted not to load more than her registered tonnage with stone, marble, lead, ores, or bricks, without the consent of the agent of the underwriters. The vessel was loaded with phosphate rock beyond her registered tonnage.

On appeal to the Supreme Court in Canada it was

Held (affirming the judgment of the Court below), that a verbal consent of the agent to load down to the load line mark, the same as if loading coal was sufficient to allow insured to load beyond the registered tonnage of the vessel.

Appeal dismissed with costs.

Weldon, Q.C., and Palmer, for appellants.

Barker, Q.C., for respondent.

QUEEN'S BENCH DIVISION.

Full Court.]

STILWELL V. RENNIE.

Libel—Separation of jury after judge's charge—Consent of counsel—Delegation of counsel's authority—Possibility of outside influence—Refusal to interfere with verdict.

In an action for libel, after the charge of the judge, the jury were allowed to separate with the consent of the counsel for the plaintiff and for two of the defendants; the counsel for the

other defendant, P., having left court before the judge's charge, but before leaving he had authorized F., the counsel for the other defendants in the same interest with P., to take, on his behalf, any objections he might think proper to the charges. Before re-assembling, some comments on the case very prejudicial to the defendant, P., were published by the *Mail* newspaper which the jury might have had the opportunity of reading. On re-assembling, the jury found a verdict against the defendant, P.

The Court, not being satisfied that P.'s counsel, as represented by F., did not assent to the separation of the jury, refused to disturb the verdict.

HOWELL V. ARMOUR.

Action against justice of peace—Notice of action and statement of claim—Defect in—Failure of action.

In an action against a justice of peace and constable for having issued a search warrant against the plaintiff for having, and concealing a colt belonging to another,

Held, that the notice of action and statement of claim being each of them founded upon a cause of action arising in a case in which the justice had jurisdiction, were defective for want of the allegation that the justice acted "maliciously, and without reasonable and probable cause;" and the statement of claim was defective in not showing a right to restitution of the property, although the plaintiff was acquitted of any wrongful taking, detention or concealment of the same.

Held, also, that the plaintiff had no ground of action against the magistrate for not restoring the property to him, because he had been acquitted of the larceny, as the magistrate was entitled to detain it, if proved to have been stolen, until the larceny could be tried, or that, for some sufficient reason, no trial could be had, and the statement of claim here did not allege that the property had not been stolen.

REGINA V. BALL.

Forgery—Alteration of Dominion note—31 Vict. c. 46 (D)—32-33 Vict. (D) c. 19 s. 10.

Held, that the alteration of a two dollar Dominion note to one of the denomination of

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twenty dollars, such alteration consisting in the addition of a cypher after the figure 2, wherever that figure occurred in the margin of the note, was forgery, and that the prisoner was rightly convicted therefor.

BLEAKLEY V. PRESCOTT.

Municipal corporation—Badly constructed sidewalk—Ice on sidewalk—Negligence.

A sidewalk in the town of Prescott was so constructed by the corporation that a portion of it slanted or declined lengthwise from west to east to the extent of eight or nine inches in a few feet. On this incline snow and ice had been allowed to accumulate and formed a ridge of hard beaten, frozen snow for a considerable distance on the sidewalk. The plaintiff, who was walking at the time from west to east, fell upon the incline and was injured.

Held, that the defendants were liable. *Burns v. City of Toronto*, 42 U.C.R. 560, and *Skelton v. Thompson*, 3 O. R. 11 distinguished.

SEYMOUR V. LYNCH.

Lease or license.

In an indenture, under the short forms of Leases Act, the plaintiff was described as lessor, and P. and H. as lessees. The granting part being that the lessor did "give, grant, demise and lease . . . the exclusive right, liberty and privilege of entering at all times for . . . in and upon that certain tract of land situated . . . reserving that portion thereof occupied, and hereafter to be occupied as a roadway . . . and with agents to search for, dig, excavate, mine and carry away the iron ores in, upon or under land, premises, etc." The lessees were also "to pay taxes and to do statute labour assessed upon the premises; and they were not to allow any manufacture or traffic in intoxicating drinks upon said premises, or carry on any business that may be deemed a nuisance thereupon."

Held, reversing the judgment of PATTERSON, J.A., a lease and not a mere license.

FEDERAL BANK V. NORTHWOOD ET AL.

Partnership—Accommodation endorsement—Failure to recover.

The plaintiffs, with notice that the endorsement of a partnership name was for the accommodation of one of the partners, nevertheless gave value for the same.

Held, that they could not recover.

HUGHES V. BRITISH AMERICAN ASSURANCE CO.

The application was by an insurance company to stay proceedings in an action on a policy pending an arbitration as to amount of loss. Under the statutory condition the Court granted a stay on the company admitting its liability on the policy, but at the request of plaintiff, without consent of defendants, the Court granted leave to either party to apply to the Court in respect of the costs of the arbitration. On a subsequent application on the part of plaintiff for an order directing defendant to pay the cost of the arbitration.

Held, that the Court had jurisdiction to deal with the costs.

GIBSON V. McDONALD.

Temporary judicial district of Nipissing—Appeal to quarter sessions of Renfrew—Grouping clauses Act—R.S.O. ch. 42.

Held, that there is no appeal from the temporary judicial district of Nipissing to the quarter sessions of the county of Renfrew—the county nearest to Nipissing.

Held, also, that the judge of the County Court of the county of Lanark could not preside at the Renfrew sessions and try such appeals, notwithstanding R.S.O. ch. 42, under which these two counties are grouped together for judicial purposes.

GOLDY V. CUNNINGHAM.

A. conveyed land to B. in 1858; consideration \$400. Deed not registered but delivered to C. till money paid. B. wrongfully got the deed from C. B. in November, 1866, conveyed to D., reserving a life estate to A. D. knew the \$400 had not been paid by B to A. B. in

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December, 1866, made another deed to D., omitting the reservation of the life estate for A. D. in 1876 conveyed to his son, E., the plaintiff, a large parcel of land, including the land in question. A. continued in possession till his death in April, 1884—having shortly before his death conveyed the land to his daughter, the defendant. D. and E. attempted by different means at several times to dispossess A.

Held, whatever claim D. or E. might have had to recover the land on paying the \$400 to A., and whatever protection they might have had against the Statute of Limitations, if they had treated A. as tenant for life under the reservation in his favour, they had lost by their adverse conduct in not treating A. as tenant for life, and that they were now barred by lapse of time.

DONALLY V. HALL.

In action against sheriff for false return, defence was that the goods seized and abandoned by him, and which were on Bald Lake, etc., were under mortgage to a bank; the goods in which mortgage were described as being "now in and upon the waters of Mud Lake, etc., and the shore adjacent thereto." It appeared that the former waters were well known as such, and as distinct from, and forming no part of the latter, upon which, no part of the goods seized had ever been.

Held, that the words in the mortgage, "now in, and upon" expressly limited the goods to which they referred to those goods then upon the latter waters and the shore adjacent, and could not include the goods seized on the former, and that defendant was liable.

ROBINS V. CORPORATION OF BROCKTON.

Plaintiff appointed (but not under seal) to make up defendants' books.

Held (WILSON, C. J., dissenting), defendants liable for the work done.

MCLAREN V. MARKS.

In action for not delivering goods, one of defendants notified S. and M. of suit, and claiming contribution as to half of any sum recovered, because they were co-partners, etc.

They appeared to notice, and the Master in Chambers afterwards gave them leave to appear, binding them by any judgment against defendants. *Held*, order right.

Notice of appeal from a single judge given 26th Nov., the decision on 14th Nov., the first day of term being 17th Nov.

Seemle, an appeal from a judge, and not a substantive motion against his order, and if so, and rule 414 was to govern, appeal too late, but that even so the Court would extend the time, the merits being with the appellant.

Rose, J.]

REGINA V. LACKIE.

Fraudulent removal of goods under the statute of George is a crime, and a defendant is not therefore compellable to give evidence against himself.

REGINA V. WALKER.

Conviction under 32-33 Vict. cap. 28—Fine and costs.

A conviction under 32-33 Vict. cap. 28, for keeping a house of ill-fame, ordered payment of a fine and costs, to be collected by distress, and in default of distress ordered imprisonment.

Held, good.

WALDIE V. BURLINGTON.

Order amending plan by closing street—R. S. O. c. III, s. 84—By-law declaring street open—Quashing by-law—Municipal Institutions Act, R. S. O. c. 174 s. 506.

By an order of the County Judge, upon the application of the plaintiff, after hearing numerous parties, including the defendants, a certain street on a registered plan was closed up. Thereafter the defendant municipality passed a by-law declaring the street in question open. On a motion to quash the by-law,

Held, that the by-law should be quashed as having been passed in disregard and contempt of the order.

Held, also, that as the order showed jurisdiction on its face, the evidence upon which it had been made should not be looked at on this application.

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PRITCHARD V. STANDARD.

Private international law—Administrator—Right to sue for moneys payable in foreign state.

To an action by the administrator in Ontario of W. M. deceased, on a policy on the life of W. M., which by the terms thereof was payable in Montreal, in the Province of Quebec, the defendants pleaded that the policy was issued from their office in Montreal; that by its terms the moneys were payable there; that the defendants had no office in Ontario for the payment of moneys by them, and that the plaintiff had not obtained letters of administration in Quebec, and had no right or title to sue for the moneys.

Held on demurrer a good defence.

CHANCERY DIVISION.

Divisional Court.]

[Dec. 18, 1884.]

CLARK V. HAMILTON PROVIDENT COMPANY.

Fraudulent preference—Insolvent circumstances—R.S.O. c. 118.

The H. Company and C. were creditors of S. S. gave the H. Company security on his lands for their claim which appeared to be good and sufficient to secure the amount due. Afterwards S. gave C. a chattel mortgage on his goods to secure C.'s claim. It did not appear that there was any fraudulent intent on S.'s part to prefer C. to the H. Company in giving the chattel mortgage. The H. Company now alleged that S. was in insolvent circumstances when he gave the chattel mortgage to C., and sought to have it declared void as a fraudulent preference under R.S.O. c. 118.

Held, that the H. Company was not entitled to the relief asked.

BORD, C.—Though the effect of mortgaging the chattels to the plaintiff (C) may be to delay the defendants (the H. Company) in making their money out of goods, and defeat them as to these goods, it does not follow that the provisions of the Act as to preference have been infringed. So far as defeating and delaying a creditor is concerned, that is often the inevitable result of preferring a favoured creditor, a thing that could legally be done at Common Law and under the statute of 13

Eliz.; but the special provisions of R.S.O. c. 118, which differ it from, and extend it beyond the statute of Elizabeth, are those relating to preference. Now the title of the Act shews what is struck at. It is the fraudulent preference of creditors by persons in insolvent circumstances. The preference must be an act of fraud on the part of the debtor with intent to prefer one creditor to another out of his goods. Here the judge has not found fraud, nor do I think it is to be inferred from the position of the parties. A creditor holding ample security is not a creditor who requires protection within the scope of R.S.O. c. 118. The creditor who is thus secured on land (as in this case) has been provided for by compact between him and his debtor, and it would not seem unreasonable that as against the secured creditors the debtor should be allowed to secure another creditor out of his goods, for that is not done at the expense of the former, nor is the debtor as to the former to be deemed in insolvent circumstances.

Quære, as to how it would be if the security given the H. Company were shown to be inadequate.

Creasor, for plaintiffs (appellants).

Bell, for defendants (respondents).

Divisional Court.]

[Dec. 18, 1884.]

WATERS V. DONALLY.

Contract—Rescission—Under advantage—inequality between the contracting parties.

If two persons, no matter whether a confidential relationship exists between them or not, stand in such a relation to each other that one can take an undue advantage of the other, whether by reason of distress or recklessness or wildness or want of care, and when the facts show that one party has taken undue advantage of the other by reason of such a condition of things, a transaction resting upon such unconscionable dealing will not be allowed to stand.

Held, therefore, in this case (affirming the decision of OSLER, J.A.) that it appearing that the plaintiff, being overmatched and overreached by the defendant, without information, and without advice, made a most improvident exchange of certain real and personal property of his own for certain real and personal

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property of the defendant, the plaintiff was entitled to have the said agreement of exchange rescinded. The plaintiff's general condition of ignorance, his want of skill in business, and his comparative imbecility of intellect were such as to require the Court to deliver him from the disadvantages of a transaction which he would not have entered into had he been properly advised and protected.

McClive, for the defendant.

Miller, for the plaintiff.

PRACTICE.

Osler, J. A.]

[Nov. 10, 1884.

VANSTADEN V. VANSTADEN.

Interpleader—Costs—Special directions to sheriff—Adverse claim contemplated.

An appeal from the direction of the Master in Chambers as to costs on a sheriff's interpleader application where the execution creditor abandoned after the claimant's affidavit had been filed.

Held, that when in addition to the writ of *fi. fa.* goods in the sheriff's hands, special directions are given to the Sheriff to seize particular goods, the Rule is, that, if the execution creditor abandons after interpleader proceedings have been taken, he must pay the Sheriff's costs, and there is no limitation to the Rule that the special directions must have been given in contemplation of an adverse claim.

Aylesworth, for the sheriff and claimant.

Clement, for the execution creditor.

Boyd, C.]

[Nov. 10, 1884.

SMITH V. GILLIES.

Patent case—Particulars—Examination.

A motion by the plaintiff to commit the defendants for unsatisfactory answers on their examination for discovery before the trial in an action to restrain the infringement of the plaintiff's patent in which the validity of that patent is attacked by the defendants.

Held, that the general law applicable to discovery governs in patent cases. A defendant may be properly interrogated as to the grounds

of his attacking the plaintiff's patent, and there should be a fair and full disclosure of the particular lines of attack which are contemplated, but no such individualizing of the persons who are alleged to be prior users as would enable the plaintiff to fix upon the defendant's witnesses.

Motion refused.

Howland, for the motion.

H. D. Gamble, contra.

Ferguson, J.]

[Nov. 17, 1884.

RYAN V. SING.

Contract for sale of land—Authority to make—Agency—Variation in acceptance of terms of offer.

C. R. S. being the owner of certain leasehold property wrote E. E. K., a land agent, a letter in these words: "Please call on J. J. R. He keeps a small shop. . . . He resides in my house on P. street and has been wanting to purchase it for some time. Tell him if he gives me \$235 cash at once I will send the papers to you for him and he can pay over the money to you. Please write me by return mail." On the following date E. E. K. wrote J. J. R. as follows: Mr. S., of Meaford, wishes me to say that if you desire to purchase some property he owns on P. street, that if you give him \$235 cash he will send the deeds to me and deliver them to you. Your early reply will very much oblige." About a month after an acceptance was endorsed on the latter letter in these words, "I hereby accept the above on the understanding that I pay no expenses," and it was signed by J. J. R.

Upon an action being brought for specific performance by J. J. R. against C. R. S. It was,

Held, that the letter from C. R. S. did not contain authority to E. E. K. to enter into a contract for the sale of the property.

Held, also, that even if there had been no question as to the authority of E. E. K. the insertion of the words "on the understanding that I pay no expenses" in the acceptance prevented it from being considered an acceptance of the offer said to be contained in the letter of E. E. K.

Murdoch, for the plaintiff.

H. J. Scott, Q.C., for the defendant.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.] [Nov. 24, 1884.

DUNSFORD V. CARLISLE.*Discovery—Privilege—Answers tending to incriminate—13 Eliz. ch. 5.*

Held, that the penal provisions of 13 Eliz. ch. 5, afford no excuse for a refusal by a defendant in an action brought to set aside a fraudulent conveyance to answer questions put to him regarding the fraudulent transaction.

Shepley, for the plaintiff.*Smoke*, for the defendant.Mr. Dalton, Q.C., } [Nov. 1884.
Osler, J. A. }**GORING V. CAMERON.***Ejectment—Counter-claim—Rules 116, 127 B, 168 O. J. A.*

In an action of ejectment. In I. G., the landlady of the defendant, D. C., intervened and appeared to the writ. The defendant, D. C., did not appear until statement of claim delivered, when he appeared and joined with M. I. G. in statement of defence.

Held appearance of D. C. regular.

The defendant, D. C., counter-claimed for damages in respect of a trespass by the plaintiff upon the lands in question, whilst he, the defendant, D. C., was in possession, and for an assault, etc., whereby he was compelled to quit the premises.

Held, that the counter-claim was not joining another cause of action with an action for the recovery of land within the meaning of rule 116.

Held, also, that the counter-claim should not be disallowed or excluded under rules 127 (B), or 168, on the ground of inconvenience, it not appearing that there would be any inconvenience and

Seemle, that the counter-claim was sufficiently connected with the cause of action to make it advisable that they should be tried together.

Mr. Hodgins, Q.C.] [Nov. 1884.

RE REES URQUHART V. TORONTO GENERAL TRUSTS COMPANY.*Master's office—Security for costs—Creditors.*

Parties residing out of the jurisdiction, who come into the Master's office in an adminis-

tration action and claim to be creditors of an estate administered there, will be required to give security for costs.

G. M. Jarvis for the plaintiff.*H. D. Gamble* for the claimant.

Rose, J.] [Dec. 2, 1884:

LIVINGSTONE V. TROUT.*Demurrer—Allowance—Costs—Rule 195 (a)**O. J. A.*

The plaintiff having demurred to a paragraph of the defence, the defendant did not within ten days after delivery enter the demurrer and give notice, nor did he serve an order for leave to amend, and the plaintiff was therefore by Rule 195 (a) O. J. A. entitled to the same benefit as if the demurrer had been allowed on argument.

The plaintiff moved *ex parte* for judgment upon his demurrer.

ROSE, J. (after consultation with *OSLER, J. A.*) *held* that the proper practice in such a case is to apply to a Judge in Court, upon notice to the opposite party, for an order to strike out the pleading or part of the pleading demurred to, and for a direction as to payment of costs; but on the return of the motion the party in default will have no right to be heard as to the validity of the pleading.

Clement, for the plaintiff.

Boyd, C.] [Dec. 15, 1884.

KELLY V. IMPERIAL LOAN CO. ET AL.*Costs—Payment of pending appeal.*

The defendants being entitled by the judgment of the Court of Appeal to the costs of the action, obtained out of Court for suit the bond given by the plaintiff for security for the costs of the action.

Before action on the bond, and pending an appeal by the plaintiff from the judgment of the Court of Appeal to the Supreme Court of Canada, one of the sureties on the bond obtained leave and paid into Court to the credit of this action \$400, the amount due on the bond, to abide further order. Upon the application of the defendants, the chancellor directed the \$400 to be paid out to their solicitors upon the solicitors undertaking to refund the amount

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

if the Supreme Court should vary the disposition of costs made by the Court of Appeal.

Moss, Q.C., and A. C. Galt, for the defendants.

Wallace Nesbitt, for the plaintiff and the surety.

Boyd, C.]

[Dec. 15, 1884.

RE THIN.

Trustee for infants—Insurance moneys—Security
47 Vict. (O.) c. 20.

An order having been made under 47 Vict. (O.) c. 20, sec. 12, for the appointment of a trustee to receive insurance moneys to which infants were entitled, the Master in Ordinary named a person as trustee, and required him to give security in double the amount to be received.

On an *ex parte* appeal from the direction of the Master that security should be given,

Held, that it would be contrary to the uniform practice of the Court to appoint any one as the custodian of infants' money, whether as trustee or guardian, without requiring security for the proper discharge of his duties.

J. C. Hamilton, for the appeal.

Rose, J.]

[Dec. 27, 1884.

MACDONALD V. NORWICH UNION FIRE
INSURANCE SOCIETY.

Production in action—Privileged documents.

An action brought by the plaintiff as assignee of one McLean of a policy of insurance covering the goods in McLean's store.

Among the grounds of defence set up were (1) that McLean's books had been falsified; (2) that the fire had occurred through the wilful negligence of McLean.

The defendants employed two experts to investigate McLean's books and his conduct with respect to the fire, and these experts made reports.

The defendants' affidavit on production set out as documents which they objected to produce. Report of adjuster for Norwich Union Fire Insurance Society for counsel's opinion thereon. Various memoranda taken by adjuster for preparation of report and for information of counsel.

It was further stated in the affidavit that these documents were "privileged, being part

of the defendants' case, and prepared for the instruction of counsel, and prepared specially for this litigation, and in contemplation thereof."

Held, on appeal (reversing the decision of the Master in Chambers) that these documents were privileged from production.

Osler, Q.C., for the appeal.

Shepley, contra.

Rose, J.]

[Dec. 31, 1884.

RE WEST MIDDLESEX (PROVINCIAL) ELECTION CASE: JOHNSTON V. ROSS.

Ontario Controverted Elections Act—Costs—Interviewing witnesses before trial.

This was a petition under the Ontario Controverted Elections Act, R.S.O. c. 11. At the trial the petition was dismissed and the petitioner ordered to pay the respondent's costs. Sec. 100 of R.S.O., c. 11, provides that the costs may be taxed according to the same principles as costs are taxed between solicitor and client in the Court of Chancery.

Held, on appeal (reversing the decision of one of the taxing officers) that the respondent was not entitled to tax against the petitioner the costs of interviewing before the trial persons named in the petitioner's bill of particulars as bribers and bribees.

H. J. Scott, Q.C., for the appeal.

William Johnston, contra.

Mr. Dalton, Q.C.]
Cameron, C. J.]

[Jan. 6.

BROWN V. NELSON.

Interpleader—Trial of issue—Postponement.

Where the execution creditor was attacking by an action in the Chancery Division the assignment under which the claim to the stock seized by the sheriff was made, to which action the claimant and the judgment debtor were both parties, the trial of the interpleader issue between the claimant and the execution creditor was postponed till after the trial of the action.

Aylesworth, for the sheriff.

C. R. W. Biggar, for the ex-creditor.

Wallace Nesbitt, for the claimant.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Osler, J. A.]

[Jan. 6.]

BROWN v. NELSON.

The order of Mr. Dalton, Master in Chambers, noted *ante* vol. 20, p. 390, directing a set-off *pro tanto* of the plaintiff's costs against the defendant's judgment on his counter-claim affirmed on appeal.

Wallace Nesbitt, for the appeal.

C. R. W. Biggar, contra.

Rose, J.]

[Jan. 12.]

POWELL v. LONDON ASSURANCE CO.**POWELL v. QUEBEC INSURANCE CO.**

Jury notice—Application for leave to file—Costs.

The plaintiff omitted to file a jury notice with his last pleading, and applied *ex parte* to the Master in Chambers for leave to withdraw the last pleading and re-file it with a jury notice. The leave was granted. On appeal from the order granting leave,

Held, that when the plaintiff came to the Court to be relieved from his slip he should have been called upon to show that the case was one which should be tried by a jury and that unless he had been able to do so the defendants should not have had their statutory right to have the case tried by a judge without a jury taken away.

Held, also that notice of the motion should have been given to the defendants in accordance with the spirit of Rule 406, O. J. A. On such a motion costs should be refused to a party who appears merely to ask for costs.

The appeal was treated as a substantive motion for leave to file the jury notice and the order of the Master was affirmed without costs.

Charles Millar, for the defendants.

W. A. Foster, for the plaintiff.

Rose, J.]

[Jan. 12.]

THE QUEEN v. SCOTT.

(2 cases.)

Certiorari—Right of defendant to—32 & 33 Vict. (C.) c. 31, sec. 71 and 33 Vict. (C.) c. 27, sec. 2.

The defendants having been convicted by the Police Magistrate of Chatham of an offence against the provisions of C. S. C. cap.

95, appealed to the Quarter Sessions, and the convictions were affirmed in appeal.

The defendants now applied for a *certiorari* to remove the convictions notwithstanding that 32 & 33 Vic. (C.) c. 31, sec. 71 as amended by 33 Vic. (C.) c. 27, sec. 2., expressly takes away the right to *certiorari* where there has been an appeal to the Quarter Sessions.

The defendants contended that the right to *certiorari* was not taken away because the evidence did not disclose any offence; the decision in *Regina v. Dodds* showed that the evidence taken in these cases proved no such offence as was set out in the convictions, and hence the magistrate had no jurisdiction.

Held, that where the magistrate has jurisdiction over the offence charged, and the right to *certiorari* is taken away, the Court cannot examine the evidence to see if the Magistrate had jurisdiction to convict.

Certiorari refused.

Langton, for the defendants.

Cartwright, for the Crown.

Mr. Dalton, Q.C.]

MCCULLOUGH v. SYKES.

Judgment—Revivor—Statute of limitations—Scire facias.

Judgment recovered in 1856.

Order to revive by entering suggestion on roll under C. L. P. A. by Mr. Justice Morrison on 23rd Oct., 1869.

Suggestion entered 22nd Jan., 1870.

No execution issued since that date.

On 6th Dec., 1884, C. E. Jones obtained from Master in Chambers an order for plaintiff to issue execution under Rule 255 O. J. A.

G. F. Harman moved to set aside order for execution on ground that judgment barred by Statute of Limitations.

THE MASTER IN CHAMBERS dismissed the application with costs on ground that entry of suggestion under C. L. P. A. gives a new starting point for the statute to run from, and that the period of limitations on judgment is twenty years under R. S. O. cap. 61 and not ten years under R. S. O. cap. 128. *Allan v. McTavish*, 2 A. R. 278, *Boice v. O'Loan*, 3 A. R. 161, commented on and followed.

C. E. Jones, and George Bell, for plaintiff.

G. F. Harman, for defendant.

Hector Cameron, Q.C., for garnishee.

CORRESPONDENCE.

CORRESPONDENCE.

ADMISSION TO THE BAR OF NEW YORK STATE.

To the Editor of the LAW JOURNAL:—

THERE seems to be a tendency of late among many young men in Canada to settle in the State of New York, with a view of practising the legal profession, some reading such books, in their course of study in Canada, as they deem will be of most advantage to them when reaching their destination, to the neglect of matters material to a successful practice at home; others not directing their energies to forming favourable connections in Canada, or abandoning such connections when already formed, and, in very many cases, in ignorance of the terms and conditions of admission to the Bar of that State, and the chances of success even after admission.

It is a prevailing opinion in Canada that the examinations, when any are necessary to be passed in order to be admitted to practice in any of the United States, are not as severe as those to which students are obliged to submit themselves in the Canadian Provinces, and in this respect the impression is fairly founded, not so much, however, in respect to the State of New York, as to the other States.

But members of the Canadian Bar and students for admission thereto have another and much more serious difficulty to overcome than the legal examination in order to secure the right to practice in New York State, and that is their citizenship, it being a condition precedent to admission to the Bar of that state, that the applicant shall be a citizen of the United States, the conditions of which require, among other things, a declaration of intention to become a citizen thereof, and renunciation of allegiance to the country from which the applicant comes, and five years continued residence within the United States.

The question whether citizenship was or was not a prerequisite to admission under the laws of New York State was fully considered and passed upon in a late case in the Court of Appeals (the Court of last resort in that State) reported in vol. 90, page 584, of the New York Court of Appeals Reports, where the learned judges were unanimous in the opinion that citizenship was a prerequisite to admission to the Bar of that State.

The facts of the case appeared to be that a British subject had practiced as an attorney at law in England from 1875 to 1881. That upon

proof of that fact and upon satisfactory evidence of his character and qualifications and upon proof of age and of his having declared his intention to become a citizen of the United States, the Supreme Court of the State of New York in the second judicial department thereof, on May 8th, 1881, made an order admitting him to practice as an attorney and counsellor at law in the Courts of that State. He so practiced from that date until the matter was brought before the General Term of said Court, in said department, upon notice to all parties concerned, when the General Term made an order vacating its former order, admitting him to practice on the ground that the said Court had no power or jurisdiction to grant the former order, and his name was thereupon stricken from the roll, whereupon he appealed to the Court of Appeals, which Court affirmed the order of the Court below, revoking his license.

But granting that all the difficulties of admission have been overcome, the prospects are by no means the most brilliant, the competition being much more severe than in Canada. Take New York City, for instance, with nearly 6,000 lawyers, almost all of whom are natives of the State, familiar with the ways of the people, and have the advantages of extended business and social connection and acquaintanceship conducive in a great degree to the acquisition of clients.

Many Canadians are prone to think that to locate in New York means assured success. Let not the young men of Canada deceive themselves, they will find at the Bar of that State many hard working energetic capable lawyers, men who devote their time both early and late to the continuous and well directed prosecution of their profession, so many in fact, and so well directed, their efforts, that the competition there is most intense.

New York State undoubtedly presents some advantages in a pecuniary sense to the practitioner of the law, in as much as his compensation is entirely the subject of contract, expressed or implied between himself and the client, and not at all subject to taxation by the taxing officer, who has simply the taxation of costs, as between party and party. This has the effect of creating absolutely no limit or criterion upon which compensation may be based; but as an attorney or counsellor becomes known for his ability, and conspicuous in his profession, his clients not only increase in number but his scale of compensation also increases. In a case where no contract has been made for services, the extent of the compensation depends upon the nature of the services, amount involved, and the position in the profession

BOOK REVIEWS.

occupied by the counsel or attorney. The scale of charges is much higher in New York than in Canada, but so is the cost of living and expenses incidental to business, but the increase in compensation is higher proportionately than in the expenses of living.

New York presents much to attract the man who has fair ability and more than average health and energy, there being no limit to the results to be achieved in the extent of business obtained or the compensation thereof. He with good health, honesty and well directed labour, continuously applied, may rise above the average, and get beyond the strong current of competition, and then enjoy the fruits of his labour, if such labour has not as in so many cases it has done, left a ruined constitution, a physical and mental wreck. If a man justly feels that he has some merits which will enable him to outstrip the generality of men, New York affords him opportunities no other place on this continent does, to realize and reach the height of his ambition, but in the middle walks of professional life, the intense competition therein, caused by such vast numbers struggling in those paths, make the rewards of toil small, considering the necessarily unceasing efforts.

WILLIAM B. ELLISON.

New York, January, 1885.

BOOK REVIEWS.

THE LAW AND MEDICAL MEN. By R. Vashon Rogers, jr., of Osgoode Hall, Barrister-at-Law. Toronto and Edinburgh: Carswell & Co., 1884.

We welcome another book from the pen of an old friend. Mr. Rogers has marked out for himself an entirely new plot in the field of legal literature, and this plot is filled not only with things good for food, but with those pleasant to the eyes. This patch is also well tilled, and has fewer weeds than most of its neighbours'. The first chapter on Early Practitioners and Law is a most readable sketch to any one, lay as well as legal. The next, on Fees, is especially interesting to the "Craft of Surgery and Barbouris," to whom we were previously introduced. Chapter III. wears a familiar face to us, and may be found in the columns of this journal in a previous volume. "Who may Practice" is also of special interest to this jealous craft. If lawyers could take a leaf out of their book and protect themselves instead of metaphorically cutting each other's throats, it would be a

great many dollars in their pockets in the course of a year, and not leave them to fall a prey to managers of loan companies and that ilk, whose principal mission in life, next to seeing that their own services are appreciated to the full, by fat salaries, is to cut down lawyers' fees to starvation prices. We next have discussions on Negligence and Malpractice. Then Professional Evidence and Medical Experts; and what a curious lot these doctors are in the witness-box to be sure. The differences of doctors beside the bedside of a dying patient is a joke to the opposite views they express in court when pitted against each other on different sides of a case. The chapter on Relations with Patients comes very properly immediately before that devoted to Dissection and Resurrection. Dentists and Druggists bring up the rear, with a few pages on Partners' Goodwill and Assistants. We need only say that the book is in Mr. Roger's happiest vein, and should be on the shelves not only of the lawyers, but of the medical men, as also of all others who wish to gain much interesting information in a pleasant and easy way.

OUTLINES OF ROMAN LAW, Comprising its Historical Growth and General Principles. By William C. Morey, Ph.D., Professor of History and Political Science (formerly Professor of Latin) in the University of Rochester. New York and London: G. P. Putnam's Sons (the Knickerbocker Press) 1884.

From such examination as we have been able to give to this little work we should say it was well fitted to serve the purposes for which the author states it to have been written, viz.: those of a manual for the use of students and of others who desire an elementary knowledge of the history and principles of the Roman law, and of a guide to the further study of the Roman law. The first part is concerned with the history of the Roman law, and carries the reader from the period of the first beginnings of the ancient *jus civile* through the Empire and the Middle Ages, down to the present time. The second part discusses the general principles of the Roman law. At the conclusion of each chapter, as well as in the Appendix at the end of the volume, is a list of works by various authors intended as a guide to those who wish to carry on their studies of the subject. We should say, therefore, that any one desirous of studying Roman law can scarcely find a better work on which to commence than this. It is well fitted to serve as a scaffolding on which to build the fabric of a more extended knowledge. American authors have gained perhaps a higher reputation in the department of Jurisprudence than in any other, and we fancy the book before us will meet with much approval. As

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

illustrating the author's style, as well as touching upon a very interesting subject, we will quote a single paragraph from the work:—

"*The Jurists and Indirect Legislation.*—To appreciate still further the great influence exercised by the Roman lawyers in the days of the Empire, we must keep in mind the fact that the privileged class of jurists were not merely scientific expounders of the law. They were, in fact, a body of men who exercised a kind of legislative authority. The possession of the *jus respondendi* gave to them a position entirely unique in the history of jurisprudence. It is evident that their interpretation of the law partook of the character of indirect legislation; and, consequently, the rational principles which they advocated became actually incorporated into the body of the positive law. Let us look for a moment at the peculiarity of this kind of legislation, and the reforming influence which it exerted upon the substance of the law. The indirect method of legislation employed by those jurists who possessed the *jus respondendi* may be simply compared to what has been called in modern times 'judicial legislation.' The function of the judge is theoretically confined to declaring and applying the law to a given case. But in the very process of construing the law to meet the case in hand, the law may become specialized or even modified. Supplementary provisions thus grow up through judicial administration, which, by being enforced in the given case and by being used as precedents in similar cases, acquire the character of new laws. In certain respects this bears an analogy to the way in which the Roman law became modified by passing through the hand of the jurists. But the jurists were not judicial magistrates; and their opinions of the law were not restricted to cases actually presented for adjudication. Any legal question whatever might be made the subject of their discussion, and their opinion upon such a question obtained the same authority as though it had been declared as law by a legislative body."

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Common words and phrases—

Wholesale Liquor Dealer—Mechanic—Needless torture or mutilation—Heirs—Merchant—Bridge—Wait—*Albany L. J.*, July 26th, 1884.

Lodger—Soil—Rubbish—Fifth—Debt—Ferry—Literary or Scientific—Voucher—Game—Settle—Beer—Standing by—*Ib.*, Sept. 20th

Family—Clause—Gaming—Production of labour—Rates of taxes—Lodger—Lottery—Commit or make an assault—Saw Mill—*Ib.*, Oct. 25.

The presumption of payment—*Ib.*, Aug. 2, 9, 16.

Railroad accumulating surface-water—*Ib.*, Aug. 16.
Presumptions from alterations of instruments—*Ib.*, Sept. 27.

Compensation of husband who acts as wife's agent—*Ib.*, Dec. 6.

Selling liquor to a drunken person—*Irish L. T.*, Sept. 6.

Administration granted on concealment of will—*Ib.*, Oct. 11.

Equitable estoppel as affecting title to land—*Central L. J.*, Aug. 1.

Liability of employer for negligence of independent contractors and their servants—*Ib.*, Aug. 8.

Restrictive covenants in a conveyance of real estate—*Ib.*, Aug. 15.

Escrows—*Ib.*

Exhibition of personal injuries to the jury—*Ib.*, Aug. 22.

The transportation of live stock—*Ib.*, Aug. 29.

Liability of agents upon unsealed non-negotiable instruments—*Ib.*, Sept. 5.

Partial restrictions on business freedom—*Ib.*, Sept. 12.

Donatio mortis causa—*Ib.*, Sept. 19.

Waiver of mechanics' liens—*Ib.*, Oct. 3.

Liquidated damages—*Ib.*, Oct. 10, 17.

Directors of corporations (Authorities—Powers—Duties—Liabilities)—*Ib.*, Oct. 17, 24.

Contracts of carriers limiting liabilities for negligence to a specified suit—*Ib.*, Oct. 24.

Damages for employees breach of contract for services for specified period—*Ib.*, Oct. 31.

Implied condition on the lottery of a furnished house—*Ib.*

The following notice is posted up on the Court door of the Queen's Bench Division:—

HILARY SITTINGS, 48th VICTORIA (1885).

It is ordered that there shall be a peremptory list of at least four cases on the first and every subsequent day of these sittings.

In case no counsel is present to support the motion or order *nisi*, the same shall be dismissed or discharged with costs.

In case no counsel is present to oppose the motion or order *nisi*, the same will be argued *ex parte*.

These rules will be strictly enforced.
By the Court.

JAMES S CARTWRIGHT.

Registrar.

Dated this 24th day of January, 1885.

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No. 4.

DIARY FOR FEBRUARY.

15. Sun.....*Quinquagesima Sunday.*
16. Mon.....Maritime Court Act came into force, 1878.
17. Tues.....Supreme Court Session begins.
18. Wed.....Ash Wednesday. Wm. Osgoode, first C.J. of U. C., died 1824.
19. Thur.....Divisional Court Sittings, Chan. Div., H.C.J., begin.
20. Sun.....*Quadragesima Sunday.*
21. Fri.....Sir John Colborne, administrator, 1838.

TORONTO, FEBRUARY 15, 1885.

HON. MR. JUSTICE SMITH, of Manitoba, unhappily did not live long to enjoy the honours of his position. But as we learn from our Manitoba cotemporary it was long enough to win the respect and admiration of the Bar, both for his legal ability and for his kind and courteous bearing. He is succeeded by Mr. A. C. Killam, Q.C., of Winnipeg. Mr. Killam is said to be a good lawyer and likely to be a useful addition to the Bench.

A RECENT suggestion of Sir Edmund Beckett, addressed by him to the *Times*, has attracted some attention recently in England. It is that a short Act should be passed for describing Acts of Parliament in future by the year A.D., instead of the year reckoned from the accession of the sovereign, which, in the case of our present Queen, necessitates adding 37 to the latter date, in order to discover the year A.D., with the additional inconvenience that Acts of Victoria are described as passed in two consecutive years, e.g., 30-31 Vict. cap. A correspondent on the subject adds:—

"It is true that 'short titles' have done much to obviate the necessity of numerical reference altogether, e.g., Public Health

Act, 1875, instead of 38 and 39 Vict. cap. 55; but inasmuch as a short title to an Act, though of recent years the rule is not universal and requires a special clause in the Act itself declaring that the Act may be so cited, it would obviously be more simple and conducive to memory to describe an Act numerically as Vict. 1875 cap. 55, than by the old-fashioned title of 38 and 39 Vict., etc., which was itself substituted by Lord Brougham's Act of 1850 for the long-winded titles now happily superseded (in most cases) by short descriptive titles."

We certainly cordially concur in these propositions. The present system has, it appears to us, nothing but custom to recommend it, and it is curious that it should have lasted so long unchallenged.

It will not, we think, be out of place for us to refer to the appointment to the Senate of Canada of James Robert Gowan, until lately the County Judge of the County of Simcoe. The appointment has been accepted by parties of all shades of politics as creditable to the Government of the day and an honour deservedly bestowed upon an old and faithful servant of our country. With no political influence to wield, with no political ambition to gratify, with no selfish purposes to serve, with means sufficient to make him thoroughly independent of any temptation to office, he is just the sort of man one likes to see in the halls of the Legislature. His recommendation for the position was the record of a long and useful public life, with abilities and experience far above the average. He will bring to the discharge of his legislative duties a calm, highly-trained judicial intellect, a mind well stored, not only with

EXAMINATIONS FOR DISCOVERY.

legal lore, but with a large fund of general information which cannot but make him a most useful member of the Upper House.

We look upon this appointment as the establishing of a happy precedent. A retired judge, whether of the County Bench or Superior Court, in many instances will preserve sufficient mental vigour and physical strength to discharge the duties of a legislator—especially in the less partizan atmosphere of the Upper Chamber of our Dominion Parliament. The appointment of Judge Gowan opens up a new and useful field for men of this class in which the ripened experience and trained abilities of some of our ablest judicial minds may find congenial occupation, and at the same time afford an honourable and fitting termination of advantage to the step to many eminent careers.

EXAMINATIONS FOR DISCOVERY.

AT the trial of a recent case, *Clark v. Loughead*, before Ferguson, J., in the Chancery Division, that learned judge took occasion to make the following remarks on the above subject:—

"There was a law before the time of these present special examinations, whereby discovery could be had for the purpose of guiding people in framing their suits and defences in order to get the proper matters before the Court for trial; then the case was tried upon the evidence.

Now we have discovery extended to such an extent that the examination in most cases makes the brief for counsel, and trials are extended to an enormous length, without getting any nearer the truth by preliminary examination.

I think that is the result of my observation, and I know it is the opinion of a great many others. Now I have on an average 200 to 300 cases to try every year—over 200. Here is a case involving \$110, to

get the money out of property, the balance of which is not very large over the mortgage that is upon it, and if it requires two days, or two and a-half, to try this case, how can the work ever be done? I shall have to consume 800 or 900 days in every year in order to do the work.

These examinations certainly do not aid, to the extent that is supposed, in getting at the truth. After all that may be said about what a witness has said before another tribunal, or another man taking the examination, and how he or she may recollect what was said then, without an opportunity of observing the circumstances under which certain answers were made to certain questions put, there is not the light afforded that many seem to suppose.

The great bulk of the matter on which the determination must take place is what proceeds from the witnesses, in presence of the judge who is to try the case. This is running out so far that it is impossible to try a docket of many cases at all; one docket might take a whole year; one counsel has as good a right to avail himself of it as another. It is the law that it may be done, but it will come to a deadlock in doing the business of this country. I am not alone in these views."

The original of the modern practice is to be found in the written interrogatories, which formerly constituted a part of a bill of complaint in Chancery. These interrogatories were often very voluminous, and had to be exceedingly minute, so as to compel an explicit answer to the matter, as to which discovery was sought, and prevent the possibility of evasive answers being given. The answers to these interrogatories were framed by counsel, and although sworn to by the defendant, it is to be feared were often expressed in a way that the defendant would not have expressed himself if orally interrogated. In order to get over the manifold inconveniences, expense, delay and trouble, involved

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in the delivery of written interrogatories, at an early period in the history of Equity practice in this Province, the order for production of documents, and the right to make an oral examination of the opposite party after answer, or after the time for answering had elapsed, was substituted for the written interrogatories. It was hoped by subjecting the party to an oral examination the discovery of matters within his knowledge might be more readily obtained. The affidavit of documents, and the oral examination together are, we are sure, an improvement on the original method, but the modern practice is undoubtedly liable to abuse, and no doubt is often abused. At the same time it is somewhat difficult to suggest an effective remedy. The officer before whom the examination is conducted is generally loath to interfere with the course of such examinations; his pecuniary interest, moreover, is in favour of their being spun out as much as possible, not that we imagine that mere pecuniary interest would induce any Special Examiner to depart from his duty. At the same time, in doubtful points it would with some men have a certain weight. Then again the solicitors who are paid for their services by the hour, have a direct pecuniary interest in prolonging such examinations.

High-minded practitioners are, doubtless, not deterred by any pecuniary loss from making such examinations as short as possible, and from protesting against their being protracted to an unnecessary length. There are, however, men who have not such a nice sense of duty, and even men who have, may be deterred from objecting to prolixity, by reflecting that though the examination be shortened, there would be no saving of time, and possibly a loss of time by the wrangling to be gone through in order to maintain the ground. The only remedy we can think of for the evil, is to pay Special Examiners by salary, and give them greater power than they at

present possess of cutting short examinations, taking good care that those only are appointed Special Examiners who are competent to exercise discretionary powers. When you have made it the interest of the examiner to make such examinations as short as possible, a long way will have been gained towards making them really more effective, and at the same time save them from being made oppressive, or needlessly costly.

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CONSIDERABLE interest, and, we may say, in a sense no way offensive to Mr. De Souza, some amusement, has been created by the claim made by that gentleman, before the Common Pleas Divisional Court, to a right of audience in our Courts, by virtue of his having been duly called to the Bar in England, where he has won distinction of an academical nature, by gaining one of the Lincoln's Inn Scholarships, and from which he carries with him flattering testimonials of ability. His argument is certainly an ingenious one, and we shall not be surprised if he is successful in upholding it. We are able to present it to our readers in a concise form, in Mr. De Souza's own words:—

“The right of English Barristers depends upon R. S. O. c. 139, which in section 1 expressly declares the qualifications of those who are to practise at the Bar. There are five classes whose right is absolute and beyond the refusal of the Benchers; in four cases it is absolute upon certain conditions being performed, while in the other (that of English Barristers) there is no condition whatever. In section 1, sub-sections 1, 2, various periods of pupillage are prescribed, among them that of *membership* of the Law Society. In sub-sections 4, 5, as well as in 1 and 2, examination is imposed and the Law

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Society is required to inspect testimonials. But in sub-section 3 nothing more is said than, 'any person who *has been called* in England.' He is not required to join the society, nor to be certified by them, nor to present to them his testimonials, nor to undergo any examination, nor to obey any rules of the Law Society.

That these distinctions are not unmeaning may be found from considering the history of the statutes on this subject.

By stat. 37 Geo. III., whereby the Law Society was founded, 'none are to practise but such as are of the Society;' but it expressly provides that English Barristers shall have this privilege, upon producing testimonials *to the judges*, not to the Law Society; and they were not required to join the Law Society except by a *condition subsequent*, taking effect one month *after* they had already, by reception in the King's Bench by the judges, acquired full and *independent standing*.

Here then commences this distinction; it is as old as the Law Society itself. Membership of the Law Society was not originally necessary to English Barristers.

Stat. 2 Geo. IV., c. 5, then requires English Barristers to join the Law Society, but does not make their right of audience any the less absolute, or within the refusal of the Law Society.

C. S. U. C. c. 34 names and specifies four classes who alone shall have audience; but various conditions are presented in every case except in the case of English Barristers. The provision of the stat. 2 Geo. IV., requiring English Barristers to join the Law Society is not retained. We have seen that before stat. 2 Geo. IV., membership of the Law Society was not prescribed to English Barristers except by the doubtful operation of a *condition subsequent*. The privilege and exemption of English Barristers is placed in even a stronger light by the course that Barristers from certain colonies (see C. S. U. C. c. 34) who, under the stat. 37 Geo. III., were in the same category with English Barristers are now, by C. S. U. C. 35 (section 1, sub-section 4), disjoined and their right is made to depend upon the existence of mutuality or reciprocity while that of English Barristers remains as unqualified and as absolute as ever. *Expressio unius, alterius exclusio*. 'The several inditing and penning of the different branches,'

says Lord Coke, 'doth argue that the maker did intend a difference in the purview and remedies.'

By R. S. O. c. 138 the same distinction is preserved. It says in section 1: 'Subject to rules *under a certain statute the following and no other*.' What then is the scope of these *rules* here mentioned? By the statute in question, the Law Society, at section 38, has a power to '*make rules on special cases* respecting the admission of *students*.' This is a power to increase, not to diminish; to admit a student in, say, *two* years, not to impose upon him an additional period of *ten*; nor yet to say that certain persons shall not be admitted whose right, depending on a special statute, cannot be of the class called *special cases*."

Whether Mr. De Souza ultimately succeeds in establishing his right to practise at our Bar or not, we certainly think he will have no reason to complain of any ungenerous treatment at the hands of the profession, many of whom have already shown themselves even eager to extend to him any friendly offices in their power. We feel that in placing any obstacles in the way of English Barristers practising in our Courts, the Law Society is "cruel only to be kind," in view of the competition already existing; but if Mr. De Souza should succeed in showing that no such obstacles at present really exist, he will be welcomed to the Bar ungrudgingly, with what we hope we are justified in calling true Canadian hospitality.

OSGOODE HALL LIBRARY.

THE management of Osgoode Hall Library is of so great importance to a large portion of the members of the profession, that we think no excuse is called for if we from time to time recur to it. To our mind, the great evil of the present library is that it is a thoroughfare to all the Courts. A library should not, if it can possibly be avoided, be used as a thorough-

fare. We would suggest to the authorities that it might be a great gain if the new hall were made use of as a library. It would hold a very large portion of the books, if not all, which are at all in active use. At the same time it would be quiet and undisturbed by reason of its not being a thoroughfare. The present library could then be used, partly still as a library, but mainly as a room for seeing clients, a waiting room for witnesses, etc. At all events, the use of the hall as a library would, it is thought, be so great a gain, that the fact of its being at present used as a lecture and examination room is a small objection to the scheme.

But if the present library must continue to be the only library, we would urge replacing in the alcoves the tables which used formerly to be there. At present any one intent on searching up the law governing some point which necessitates reference to a number of authorities, and much thought and reflection, may often look in vain for a quiet table on which to place his books, and at which to pursue his researches. The tables now in the library are few, and generally crowded. It is certainly not conducive to profitable study to have some one touching your respective elbows on each side. It might also be well to replace the tables in the two rooms, which were formerly the Benchers' rooms, at each end of the library. At present, these rooms are well nigh worthless as places for reading. Many of the profession share these views. The above suggestions may possibly not be the best that can be made, but we offer them in the hope that whatever is best in the premises may be done.

SELECTIONS.

THE TEMPLE CHURCH.

AFTER a few years' absence from London it is hardly safe to assume the present existence of any old landmark, but we hope the much decorated barber's shop in Fleet street, just within Temple Bar, has escaped the fate of its better known neighbour, the old Bar itself, and still remains with its bold inscription informing the passer-by that here once stood the palace of Henry VIII. A second Elia would find matter for an essay in such an instance of the irony of history, but the mantle of Elia, alas! has not fallen upon any successor, and our purpose is not to moralize, but to turn once more, as in the happy days of yore, down the archway under the shop, and descending the flight of steps to enter the ancient and solemn portal of the Temple church. What an airy architecture have we here! How original and striking the effect of the old octagon chapel—of which the first stone was laid by an eastern patriarch in the early crusading days—opening into the younger but still ancient oblong, forming now the principal building. Around us lie the Crusaders themselves, with legs crossed, and their great guards by their sides, while over our heads the quaint gargoyles show the exuberant wit of monastic fancy. How some old fellow must have chuckled to himself when he knocked off this poor sinner's head, with the devil actually eating his ear! Truly Rabelais was not without predecessors who writ their mocking tales in stone.

But we pass through the barrier and enter the main building. Our lady companions are ushered to their separate seats at the side, and we bachelors for the nonce must take our places in the middle pews, for the separation of the sexes still remains a custom of this church, handed down from the old monastic times. A chorister boy is busy arranging music books. A distant strain of rehearsal reaches us from the outer buildings, and we may therefore safely conclude that we have a quarter of an hour to spare before service commences. We notice the clean spring of the arches from the darkly

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glistening, many columned pillars, the rich, soft colours of the roof, the purple windows, the quiet, unobtrusive completeness of the whole building, and we admit that the Honourable Societies of the Inner and Middle Temple have indeed known how to build to God a church worthy of their old and noble guild. We recall, too, the many famous divines that have preached here, from the sad and serious Hooker, the stately periods of whose "Ecclesiastical Polity" still delight the student of Elizabethan literature, down to the present distinguished master, C. J. Vaughan, whose sermons are a model of cultured power.

Even this afternoon we notice in the congregation many a famous man. Yonder, pathetic in his blindness, sits the beloved Sir John Karslake, and next to him is Sir Thomas Chambers, recorder of the city, whilst just behind them, also amongst the Benchers of the Middle Temple, we espy the ruddy countenance of the Prince of Wales. Over against them, on the Inner Temple side, sits old Lord Chelmsford, erst chancellor, close to his successor on the woollack Cairns, and further on, Selborne, who in his turn has ousted Cairns, is cheek by jowl with the last of the chief barons, Sir Fitzroy Kelly. The Temple congregation is probably the most intellectual and distinguished in London, and it is no ordinary ordeal a preacher here has before him.

Now let us see what music we are to have, and whilst we are examining our anthem and church books we do not fail to note the winged Pegasus stamped thereon, the emblem of the Inner Temple. We are just deep in the learned examination of cathedral music, which precedes the chorals, when the melodious thunder of the organ awakes our attention. Nor must we omit to notice this famous instrument, peculiar in having six black keys to each octave, to wit, a B minor distinct from the D sharp, built by Smith, the father of English organ building, *in tempore* Charles II. The construction thereof was a subject of competition between the aforesaid Smith and the then equally renowned Rhenatus Harris. Both rivals erected an organ in the church, and the *cognoscenti* of the day were at a loss to decide which to select, till ultimately the choice was left to Chief Justice Jeffreys of bloody Assize

infamy, who pitched upon the one which, greatly augmented and improved, now delights us with its soft fullness of tune. For many a year has Hopkins, the present organist, to whom the English Church is indebted for some of its most beautiful services and anthems, presided at its keys, and long may he remain an institution of the Temple!

And now the choir and clergy enter, and even-song commences. We will not dilate upon the well-matched voices of the boys, the harmony of the chorus, and the sweetness of the solos, but the most unmusical hearer cannot but be struck by the exceptional effect of the hymn singing in which the voices of the whole congregation join. Each person has the tune before him, and the majority of the worshippers being sufficiently skilled in music to take their parts, the result is a grand volume of harmonious sound. The preacher this afternoon is the reader, Ainger, a quiet scholar, whose thoughtful cogent discourses have in large part remained in our memory (a memory not too prone to retain sermons) even after the lapse of years. The pulpit candles throw into strong relief his pale and wasted face, whilst the rest of the church is gradually shrouded in gloom, through which his well modulated voice sounds with strange effect, and it is with almost a start that we rise at the Ascription, and receive the peaceful benediction. Soon we are out in the dark and foggy streets, amongst the noise and rattle of the city, from which we have escaped for two quiet hours, and in our walk homeward Milton's noble lines came into our minds as a summing up of the afternoon:

And let my due feet never fail
To walk the studious cloister's pale,
And love the high embowed roof,
With antic pillars massy proof;
And storied windows richly dight,
Casting a dim religious light;
There let the pealing organ blow
To the full voiced quire below,
In service high and anthem clear,
As may with sweetness thro' mine ear
Dissolve me into ecstasies,
And bring all heaven before mine eyes.

—Exchange.

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[Master's Office.]

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

MASTER'S OFFICE.

MONTEITH V. MERCHANTS BANK.

Estoppel—Evidence of an accomplice—Evidence against the assigns of a deceased person—R. S. O. c. 62 sec. 10—Acts constituting an executor de son tort.

The letters of administration to an administrator were revoked after judgment in an action brought by him as plaintiff to recover certain assets of the estate, and new letters were granted to one P. who thereupon obtained an order of revivor in such action directing the further proceedings to be carried on by P. This order of revivor was subsequently discharged; and the plaintiffs (who were defendants in such action) applied to have it ruled in this action that the judgment obtained before the revocation of letters was *res judicata* against P.

Held, that by the discharge of the order of revivor the action was without a plaintiff, and could not operate as an estoppel against P.

Where certain creditors and the administrator were parties to an order authorizing the compromise of an action respecting certain assets of the estate, they were held to be bound by it in an action for the administration of such estate.

An accomplice in a criminal act is not estopped from giving evidence that certain securities given by him were void by reason of his criminal act; but such evidence should not be held sufficient to invalidate such securities in a civil suit, unless materially confirmed by other evidence, and especially where the holder of such securities was no party to the criminal act.

A decision against the assigns of a deceased person should not be given unless the evidence of the witness against such assigns is corroborated to the material evidence. R. S. O. c. 62 sec. 10.

The party who gives or sells the goods of a deceased person to another, is subject to the liability of an executor *de son tort*. If it were not so there would be no end to the number of persons who might be charged.

Where a person takes the goods of a deceased person under a fair claim of right, though unable to establish such title completely, he is not liable to be charged as executor *de son tort*.

[Mr. Hodgins, Q.C.—January 26.]

In an administration suit certain unsecured creditors of the testator sought to attack certain warehouse receipts, given by the testator to the plaintiffs and others, on the ground that they were invalid and therefore void against such unsecured creditors. The Master ruled that he had no jurisdiction to try any such an issue, but on appeal BOYD, C., held that he had. The reference then proceeded under the state of facts set out in the present judgment.

Rae and Miller, for the banks.

W. Barwick, for Walsh

J. A. Paterson, for the unsecured creditors.

J. Macgregor, for the administrator.

THE MASTER IN ORDINARY:—The order on appeal from my judgment in this case declares that any creditor or set of creditors, or the administrator is at liberty to attack or resist any claim sought to be proved against the estate in any way whatever; and directs that "the said Master is to try and determine any issues that may be raised thereon."

I had ruled that neither under this Chamber Order for administration, nor under General Order 220 had I jurisdiction to try the validity of the statutory securities called warehouse receipts given by the testator in his lifetime, nor whether such securities were fraudulent and void against the general creditors of the testator.

But under the broad terms of the order on appeal, evidence has been received on all the issues raised by the unsecured creditors and the administrator against the claims of the Merchants Bank, the Dominion Bank, and James Walsh.

The litigation respecting these warehouse receipts has been going on for some time in each of the Divisions of the High Court. About the time the infant defendant, then claiming to be administrator, obtained the *ex parte* order for administration, he instituted suits impeaching these warehouse receipts against the three parties named. The proceedings in these suits have been proved before me, and they furnish some original illustrations of legal procedure not to be found in our authorized books of practice.

Monteith v. Merchants Bank was a suit in the C. P. D. by the infant as administrator to compel the bank to account, as executor *de son tort*, for the proceeds of certain goods received and sold by the bank after the testator's death.

The bank claimed title to the goods under the warehouse receipts given by one Herson to the testator in the usual form, and which the testator had endorsed to the bank as collateral security for certain discounts.

The action was tried at the Toronto Winter Assizes, 1884, before ROSE, J., without a jury, whose findings were as follows:—

"I find as a fact that the goods claimed were covered by the warehouse receipts produced by the bank, and were taken by the bank under and by virtue of such receipts.

"I find that the bank advanced the moneys secured by the receipts.

"I find that Herson who signed the receipt was lessee of the cellar where the goods were stored and warehoused.

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"I find that Monteith represented to the bank that Herson was a warehouseman and had warehoused goods for him for years, and on such representation had obtained the advances.

"I hold that Herson cannot be allowed to give evidence that the warehouse receipts were false and fraudulent; that the plaintiff is not in any better position than the deceased, and cannot claim the goods as against his representations on which the moneys were obtained, and that the defendants are entitled to judgment with costs.

"The action is one which is not in accordance with one's notion of the commonest principle of morality, and reflects discredit on all the parties concerned in prosecuting the claim."

After the trial the letters of administration to the infant plaintiff were revoked, and letters of administration, *durante minore etate*, were on the 9th May, 1884, granted to John James Pritchard, one of the defendants in this administration proceeding.

Pritchard thereupon obtained an order of revivor in that action by which it was ordered that the proceedings therein should be continued by him as administrator and plaintiff in the room of Monteith removed.

Under some precedent with which I am at present unfamiliar, the receiver (appointed in this matter under an order dated 29th April, 1884), with the assistance of the bank, applied in Chambers and obtained an order in *Monteith v. Merchants Bank* rescinding the order of revivor—thus enriching our list of precedents with the novelty of an action pending in one of the Superior Courts without an actor or plaintiff; the order with grim justice declaring that "all further proceedings in this action are stayed."

After giving evidence of the proceedings in that action, counsel for the plaintiffs asked me to find that, under the judgment of ROSE, J., the question as to the validity of the warehouse receipts was *res judicata*; but as no analagous precedent could be found, I had to rule that an action without a plaintiff could not operate as an estoppel against an administrator who had been so unceremoniously hustled out of the suit he was prosecuting for the estate he represented.

Monteith v. Dominion Bank was brought in the Chancery Division to compel this bank to account, as executor *de son tort*, for goods of the testator received and sold by them under similar warehouse receipts after the testator's death.

The action was not tried; but on the 15th March, 1884, an order was made in Chambers upon the application of the defendants in that action as follows: "It is ordered that John J. Pritchard, of

the City of Toronto, in the County of York, clerk, be and he is hereby appointed the *next friend* of the above named Frederick William Monteith in this action; and that this action be and the same is hereby dismissed out of this Court: both parties paying their own costs of suit."

Thus a new precedent, differing from *Rutland v. Rutland*, Cro. Eliz. 378, was added to the practice, whereby an official of one of the Courts suing in a representative capacity in right of the testator, *i.e.*, in *autre droit*, and not for a personal right, was allowed the intrusive companionship of a *prochain ami* or next friend, and of one nominated by his antagonist.

Monteith v. Walsh was a similar action in the Q. B. D. against the claimant Walsh to compel him to account, as executor *de son tort*, for certain other goods of the testator replevied by him after the testator's death under similar warehouse receipts.

In that action a similar order of revivor was obtained by Pritchard as in *Monteith v. Merchants Bank*. The precedent previously established of expelling the plaintiff from his suit was not followed; but the receiver, who obtained the opinion of three counsel against the possible success of the suit, joined with the present plaintiffs, and obtained an order in Chambers in this administration matter, and in the presence of the solicitors for the unsecured creditors and for Pritchard and Walsh, authorizing a compromise, whereby the action of *Monteith v. Walsh* was dismissed without costs.

The unsecured creditors and the defendant Pritchard were parties to that order of compromise and must be held to be bound by it; and without commenting upon the propriety of the receiver's application, I must hold that, before this tribunal at any rate, the order of the Master in Chambers in authorizing the compromise is final.

The further oral evidence shews that after Monteith's death, and before any of the banks appeared at the warehouse, Herson, who had given these warehouse receipts, went with his solicitor, Mr. Macgregor, to the place where the goods were stored and posted up the following notice which was drawn up by his solicitor: "From this pile west and north is the property of the Dominion Bank and Merchants Bank, of which I am warehouseman, and have given warehouse receipts, J. Herson."

The bank's officers, when they arrived at the warehouse, found this notice up; and then Herson and his solicitor pointed out to them the goods covered by their warehouse receipts. Shortly afterwards the sheriff's officers arrived with a writ of

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replevin in Walsh's case, and Herson, who swore that he had tried to keep possession of the goods for the banks, then told the bank's officers that they might take the goods themselves, which, sometime afterwards, they did.

Herson was examined as to the validity of the warehouse receipts; and, if his evidence is to be credited, he and Monteith were guilty of a misdemeanor, one in giving and the other in obtaining money on, false warehouse receipts. His evidence, therefore, is that of an accomplice in a criminal act; and although I held that he was not estopped from giving evidence that these warehouse receipts were false and fraudulent, my experience in conducting criminal prosecutions induces me to recognize the applicability of the directions usually given to juries by judges of Assize, viz.: to regard with distrust the admissions of an accomplice, and not to give effect to them unless materially confirmed by other evidence. That salutary rule of experience is, I think, specially applicable to a civil case where the party, whose title under those statutory securities is attacked, was in no way, direct or indirect, a party to the criminal act of the criminal parties. Herson claimed no protection before giving his evidence; his evidence is unsupported, and is negated by his various warehouse receipts and by his declarations and acts in the presence of the bank's officers; and is also negated by the written and parol declarations made by Monteith in his lifetime.

The Evidence Act R. S. O. c. 62 s. 10 provides that in a suit against the assigns of a deceased person an opposite party shall not obtain a decision in respect to any matter occurring before the death of the deceased person, unless his evidence is corroborated by some material evidence.

The spirit, if not the letter of this act, applies to this case, and therefore on both grounds I decline to give effect to Herson's evidence.

Even if these warehouse receipts were invalid, I could not on the evidence find that the banks had made themselves executors *de son tort*. Applying the cases to what occurred immediately after the death of Monteith, it would be more reasonable to hold that Herson had placed himself under that liability. He and his solicitor went to the warehouse before the bank officials, and when the latter arrived Herson claimed by parol and in writing to be in possession of the goods as warehouseman, and subsequently told the banks to take them.

"If a man give or sell the goods of an intestate to A. this does not make A. an executor *de son tort*; or if he claim a property in the goods as a gift of the intestate." Comyn's Dig. Adm. c. 2. This rule was applied in *Paul v. Simpson*, 9 Q. B.

365. A lessee died intestate during the term of the lease; his widow without taking out administration entered, and paid rent to the landlord; and then with her concurrence her son-in-law took the premises and continued to the end of the term. It was held that although she might be, A was not, executor *de son tort*. WIGHTMAN, J. said: "The passages from Comyn's Digest are express authorities on this point. If this were not so there would be no end to the number of persons who might be charged." PATTERSON, J. added: "If one takes the goods of the deceased and hands them to another, this shall charge only the giver as executor *de son tort*."

So where a person sets up a colorable title to the possession of the goods of a testator, though he may not be able to establish a completely strict and legal title, such title is sufficient to exempt him from being charged as executor *de son tort*: *Femings v. Yarrat* 1 Esp. 335. In that case Lord KENYON, C. J., observed: "If the defendant came to the possession by color of a legal title though he had not made out such title completely in every respect, he should not be deemed an executor *de son tort*."

The reason for the rule is stated in the case of an executor thus: "If an executor takes the testator's goods on a claim of property in them himself, although it afterwards appears that he had no right, since such claim is expressive of a different purpose from that of administration as executor, he is not liable." Toller on Executors 43.

The cases in the United States Courts are to the same effect.

In *King v. Lyman*, 1 Root (S. C.) 104, where goods had been taken under a bill of sale, evidence was tendered to show that the bill of sale was fraudulent. But the evidence was rejected; and it was held that the holding and disposing of goods and chattels conveyed by a deceased in his lifetime would not make the party taking an executor *de son tort*. Although the bill of sale might be fraudulent as to creditors it was good and valid between the parties.

Debesse v. Napier, 1 McCord (S. C.) 106, was a case when deceased had goods in the hands of a factor for sale. The factor had a lien on them for his commission and charges. Deceased drew an order on the factor for the whole proceeds of the goods after satisfying his charges, which order the factor accepted. After deceased's death the factor sold and applied the proceeds as directed, and it was held that he had the right to do so.

If a person sets up in himself a colorable title to the goods of a deceased; as when he claims a lien on them, though he may not be able to make

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[Co. Ct.]

out his title completely, he will not be deemed an executor *de son tort*: *Densler v. Edwards*, 5 Ala 31.

So when a deceased had mortgaged certain chattels but the chattels had remained in the mortgagor's possession up to the time of his death, and the defendant then took and sold them; it was held that the taking of the chattels into his possession under a fair claim of right did not charge upon such person any liability as an executor *de son tort*: *Smith v. Porter*, 35 Me. 287. See also *Claussen v. Lafrenz*, 4 Greene 224.

The cases referred to and many others also show that the administrator Pritchard is shut out by the fraud or criminal act of the testator from impeaching the validity of these warehouse receipts.

On the evidence before me I find that after the testator's death Herson took possession of these goods; that he claimed such possession of them as the warehouseman who had given warehouse receipts for them; that he told the bank's officers that they might take the goods; that thereupon and by virtue of their warehouse receipts the banks took and disposed of the goods; that they had a fair claim of right to take the goods, and in no way took them as characteristic of the office of an executor, or so as to make them chargeable with the liability of executors *de son tort*.

I am still inclined to think that when the question of jurisdiction is further considered, it will be found that the new action of account under R. S. O. c. 107 s. 30 by one set of creditors against another set of creditors who have obtained the proceeds of a testator's estate beyond their *pari passu* proportions, and by virtue of securities which are valid against the personal representative cannot be prosecuted under a Chamber order for administration and on oral pleadings in the Master's office. If it can, then every fraudulent conveyance of property made by a debtor to a creditor in his lifetime, and not impeached, may be set aside under similar Chamber orders for the administration of such debtor's estate. The cases where this action of account has been enforced show that it lies where creditors have realized their claims out of the assets of the estate under judgments against the personal representative: *Bank of British North America v. Mallory*, 17 Gr. 102; *Taylor v. Brodie*, 21 Gr. 607.

The claims made by the unsecured creditors and the administrator under the order on appeal, are dismissed with costs.

COUNTY COURT OF YORK.

LANG V. GIBSON.

Mechanics' lien—Garnishment—Priority.

One G. did some repairing for T. and furnished the materials which he purchased from H. After the completion of the work, T. was garnished in the Division Court for the amount of a note held by one L. against G., L. having learned that T. had not fully paid G. for his work. After the service of the garnishee summons, but within thirty days after furnishing the last of the material, H. filed his lien under R. S. O. cap. 120, and intervened in the garnishee suit, claiming to be entitled under his lien to the money in T.'s hands.

Held, that the lien took priority, and that garnishee must fail.

[McDOUGALL, JJ.—Toronto, Feb. 11.]

McDOUGALL, JJ.—This is an action against the primary debtor for a note, Trinity College garnishees. Judgment has been given against the P. D. and the contest is between the primary creditor and Harris & Co., who claim to have a lien against the garnishees. The contest is as to which of them is entitled to the fund admitted to be due Gibson by the garnishees, Trinity College.

The work was completed on the 13th October, 1884, and Harris & Co., in their lien, as filed, state that the last material was supplied on the 13th October. Their lien was not filed until the 3rd November, 1884, and the garnishing process was served on the garnishees on the 20th October, 1884.

Query—Which has priority? The material furnished here by Harris & Co. was not supplied to Trinity College, but to Gibson, the P. D., who was making certain repairs to the College buildings. There was no contract between the College authorities and Gibson. What he did was jobbing work only, to be paid for by the day and according to its value.

R. S. O. cap. 120, sec. 3, gives a lien to every mechanic, etc., etc., "or other person doing work upon or furnishing materials to be used in the construction, alteration or repairs of any building," etc., "by virtue," etc., "of furnishing," etc.

Sec. 8 is to the following effect: All persons furnishing materials to or doing labour for the person claiming the lien, in respect of the subject of such lien, who notify the owner of the premises sought to be affected thereby, within thirty days after such material supplied, etc., etc., shall be entitled to a charge therefor *pro rata* upon any amount payable by such owner under said lien.

Sec. 4, as to the lien under sec. 3, enacts: That the statement of claim (for the lien) may be filed *before or during the progress* of the work aforesaid, or *within thirty days thereafter*.

Sec. 11 enacts: That all payments made in good faith by the owner to the contractor or sub-con-

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tractor, etc., before notice in writing by the person claiming the lien has been given such owner, etc., shall operate as a discharge *pro tanto* of the lien credited by the statute.

Sec. 1 of cap. 17, 1878, Ont., restricts this payment to ninety per cent. of the price to be paid for the work; and allows the remaining ten per cent. to be paid after the expiration of ten days from the completion of the work, unless the owner is meanwhile notified in writing of the existence of a claim or lien.

The Act of 1882, cap. 15, gives workmen a lien for thirty days' wages, and in case there is a contract for the work in question, gives such lien for wages to the extent of ten per cent. of the contract price, priority over other liens.

Now, here, the claim is not for wages—nor is there a contract.

It is a well settled principle of law, that a garnishing or attaching creditor can acquire no higher or better rights to the property or assets attached or garnished than the defendant had when the attachment took place; unless he can show some fraud or collusion by which his rights are impaired. Garnishment is a purely statutory proceeding and cannot be pushed in its operation beyond the statutory authority under which it is resorted to. It is a proceeding *in rem*. It is, in effect, a suit by the defendant in the plaintiff's name against the garnishee, without reference to the defendant's concurrence, and indeed in opposition to his will. Hence the plaintiff usually occupies as against the garnishee just the position of the defendant, with no more rights than the defendant had, and liable to be met by a defence which the garnishee might make against an action by the defendant.—(Drake on Attachment, 432.)

If the property, when attached, is subject to a lien *bona fide* placed upon it by the defendant, or subject to a lien by express statutory enactment, that lien must be respected and the garnishment postponed to it. The statute says that nothing shall avail the owner as against the lien-holder, except *bona fide* payment before notice of the lien. An attachment or a garnishee proceeding does not amount to an assignment of the debt. It is not in effect an execution. It is merely a plaint or claim, and amounts to nothing beyond tying up the fund until it is crystalized into a judgment.

Under our Mechanics' Lien Act, the lien commences from the furnishing of the materials—is good for thirty days after supplying the articles *without registration*, and is then extended sixty days farther by registration before the expiration of the thirty days. It can only be defeated in one way—that is by payments made *bona fide* and with-

out notice of the lien. Here there is no pretence that there has been any payment, and the point to be decided is narrowed to this: Is the service of garnishing process or the attachment of the debt (before notice of the lien has been served on the owner, and before the expiration of the thirty days), at the instance of a creditor of the contractor equivalent in effect to the payment *bona fide* allowed by the statute?

I was at first under the impression that it might be so contended; but, under the authority of *ex parte Greenway*, *Re Adams*, L. R. 16 Eq. 619, and *Re Pillers*, L. R. 17 Ch. Div. 653, I am compelled to hold that, as the lien is a statutory claim it cannot be defeated except in the manner pointed out by the statute itself. The garnishees no doubt could, had they chosen to do so, have paid the primary creditor's claim with Gibson's assent or upon his request, and have been discharged had such payment been made before they received notice of Harris & Co.'s lien or claim, but here they did not do so, and before the date when a judgment could have been obtained (18th November was Court day, I believe), they received notice of the lien. This notice—no payment having been previously made—at once perfected Harris & Co.'s claim and effectually prevented thereafter any payment to Gibson or to any one claiming (as the primary creditor in this case) through him.

Upon the other branch of the case, I have no doubt but that Harris & Co. had a lien under sec. 3, R. S. O. cap. 120. The material supplied was to be used in the repair of a building, the property of Trinity College—and they supplied it for such purpose.

I cannot conclude this judgment without adding that I heartily concur with the opinions of the many judges who have been called upon to interpret the various clauses of the Mechanics' Lien Act, and the amendments thereto, that the whole treatment of the subject is a "mass of complicated and embarrassing legislation." The conclusions I have arrived at, however, after careful consideration of the various clauses are those which I think are clearly deducible from the authorities.

My finding is that there is nothing due from the garnishees to the primary debtor available to the primary creditor, as the lien which I find has priority absorbs the whole fund garnished. The action will be dismissed against the garnishees with costs.

REPORTS—NOTES OF CANADIAN CASES.

[Chan. Div.]

COUNTY COURT OF NORTHUMBERLAND
AND DURHAM.

NEILL v. DUMBLE.

Altered note—Consideration.

An action on a cheque made by defendant in favour of plaintiff, given to retire a note endorsed by defendant alleged to have been altered by the maker, Henry Smith, by addition of the words "with interest at eight per cent."

R. W. Wilson and *W. R. Riddell*, for plaintiff.

J. W. Kerr, for defendant.

CLARKE, Co. J.,—*Held*, that the evidence showed that the note had not been tampered with; but that in any event the surrender of the note to the endorser was a good consideration for the cheque.

BRAUN v. GILDERSLEEVE ET AL.

Consequential damages.

An action in tort for being carried by the steamer *Norseman* past Cobourg to Port Hope and landed there on a ticket marked "Cobourg." Plaintiff suffered severely from the ill-treatment received. The jury brought in a verdict for \$53.

R. W. Wilson, for plaintiff.

J. W. Kerr, for defendant.

CLARKE, Co. J., reduced this verdict to \$3, holding that consequential damages could not be awarded.

RECENT ENGLISH PRACTICE CASES.

WALMSLEY v. MUNDY.

*Receiver—Reference to Master—Appeal—Queen's
Bench Division.*

The plaintiff having obtained judgment was, by an order made at Chambers, appointed receiver of the rents of some houses belonging to the defendant; the order was made without prejudice to prior incumbrances. G. having applied to discharge the order appointing the receiver on the ground that he was a second mortgagee under a deed executed by the defendant before the judgment in the action, the Queen's Bench Division referred the question as to the validity of G.'s mortgage to a Master, who, after hearing evidence, reported that the mortgage was a sham and had been executed in order to defeat the defendant's creditors. The Queen's Bench Division declined to review the evidence upon which the Master had acted, accepted his report as conclusive, and refused G.'s application.

Held, that inasmuch as the receiver was appointed under an equitable jurisdiction now vested in the Queen's Bench Division, the evidence before the Master might have been

reviewed, and the Court of Appeal being of opinion on the evidence that the mortgage had been executed in good faith, discharged the order made at Chambers, whereby the plaintiff was appointed receiver.

[13 Q. B. D. 807.]

BAGGALLAY, L.J.—The report of the Master would have been liable to review in Equity. In Courts of Common Law it has not been the practice to review the report of the Master; but it can hardly be argued that there is not power. I should have regretted to hold that no appeal would lie against the report of the Master; but, I should, of course, be bound by the weight of existing authority; this, however, is an equitable proceeding, and equitable proceedings must be adopted as a whole. The judges of the Queen's Bench Division ought themselves to have reviewed the evidence, or at least to have referred the matter back to the Master for additional consideration.

BAILEY v. BAILEY.

Imp. O. 14, r. 1 (1883)—O. F. A., rule 80.

*Order to sign final judgment—Alimony pendente lite—
Debt or liquidated demand.*

An order to sign final judgment will not be made under the above rule when the action is for arrears of alimony *pendente lite*, payable under an order of the Probate and Divorce Division.

[13 Q. B. D., 855.]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.]

[Dec. 20, 1884.]

CANADIAN LAND & EMIGRATION CO. v.
MUNICIPALITY OF DYSART ET AL.*Injunction—Court of Revision—Fraud—Juris-
diction—Costs—Stay of proceedings pending an
appeal.*

Motion for an injunction to restrain the Court of Revision of the Municipality of Dysart from raising the assessment of the plaintiffs'

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NOTES OF CANADIAN CASES.

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wild lands in the municipality. The plaintiffs set up in their statement of claim that they had appealed in respect of their assessment as being too high to the said Court of Revision, and that the members of the Court of Revision, by a fraudulent conspiracy amongst themselves, and from interested motives, in face of facts leading obviously to a contrary conclusion, and without any evidence to support the same, had not only dismissed the appeal but, on a cross-appeal brought in respect of the said assessment as too low, had greatly increased the amount of the said assessment.

Held, on demurrer *ore tenus*, that inasmuch as an appeal lay from the Court of Revision to the Stipendiary Magistrate, the plaintiffs should have appealed accordingly, and could not come to this Court for an injunction, at least until they had exhausted their other remedies.

The above judgment having been given, the plaintiffs applied for a stay of proceedings, pending a re-hearing or appeal.

Held, that there was jurisdiction to make the order, which could go upon terms.

At any time before formal judgment issued by the Court the judgment delivered, or a part of it, may be recalled, and a term imposed or a change made.

The defendants delivered a statement of defence in the action, but before any evidence was given at the trial, demurred *ore tenus*. The plaintiffs contended that under these circumstances the defendants should be allowed no more costs than if they had demurred to the statement of claim and succeeded on the demurrer.

Held (January 21st, 1885), that the dismissal of the action must be with costs. The case was of a peculiar character, presenting difficulties, and was one of much importance, involving a large sum of money.

W. Cassels, Q.C., for the plaintiffs.

S. H. Blake, Q.C., for the defendants.

Proudfoot, J.]

[January 2.]

THOMAS V. INGLIS.

Fixtures—Property in chattels under written agreement—Intention when affixed to freehold—Injunction.

T. being liquidator of a company which was being wound up, sold the manufactory to H. for \$9,000, part in cash and the balance secured by a mortgage on the premises. At the time of the sale there was an engine, boiler, pullies, etc., among the machinery on the premises, but no mention of them was made in the mortgage. H. afterwards undertook to sell the engine, boiler and pullies, but T. objected to his so doing until assured that they would be replaced by better machinery. H. purchased from J. and H., the defendants, another engine, boiler, shafting, hangers and pullies to replace the old ones upon certain conditions, set out in agreements in writing, one of which was as follows: "And it is hereby agreed between the parties that the property in . . . (machinery) is not to pass to the said H., but is to remain in the said J. and H. until the full payment of the price, . . . but the said H. to have possession at once and to use the same until any default made in the payment of the price . . . when the said J. and H. may resume possession." The engine and boiler were placed upon a stone foundation and bricked over in a building on the premises, other than the one from which the old ones had been removed, but they could be removed by taking down a part of the wall of the building in which they were placed and without injury to the old building, and the hangers and pullies were bolted to joists but could be removed without injury to the building if done carefully. H. failed in business assigned his estate for the benefit of his creditors, and made default in payment, and J. and H. began to remove the machinery.

In an action brought by T. for an injunction restraining the defendants J. and H. from such removal. It was,

Held, that under the circumstances and in cases of this kind the intention when the chattels were affixed to the freehold must govern, and that the plain agreement, evidenced by writing between H. and the defend-

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ants, was that the property in the machinery should not pass from the defendants to H. until they were paid for and the plaintiff must fail.

Tilt, Q.C. and *Mulock*, for the plaintiffs.

McCarthy, Q.C., for the defendants.

Proudfoot, J.]

[January 28.]

POWELL V. CALDER.

Chattel mortgage—Security—Preference—Judgment creditor—Interpleader—Bona fides—Void transaction—Infancy.

S. & W., a firm of whom W. was a minor, becoming embarrassed arranged with H., the managing man of J. G. & Co., their principal creditor, to give security for their debt. At the instigation of H. two notes for the amount of their indebtedness, maturing at short dates, were made by S. & W., and endorsed to J. G. & Co. by P., who was a brother-in-law of J. G., and connected with him in another business, and a chattel mortgage was given by S. & W. on everything they had in their business to P. to secure him, and \$50 was paid him by J. G. & Co. for endorsing the notes. A few days after the mortgage was given C. caused the sheriff to seize S. & W.'s goods under an execution in his hands delivered subsequent to the making of the mortgage.

In an interpleader action between P. claiming under the chattel mortgage, and C. claiming under his execution it was,

Held, that no distinction could be made between J. G. & Co. in the transaction, and that if the mortgage was invalid it must be for want of *bona fides*; that the transaction only assumed the shape it did in order to avoid the statute against fraudulent preferences; that pressure will not validate a security unless it be a *bona fide* pressure to secure a debt, and without a view of obtaining a preference over the other creditors; that the notes matured at such short dates no time was given to the debtor, no new advance was made and no security given that the notes or the mortgage would not be enforced when they fell due, and that upon the whole case the mortgage was "null and void against the creditors."

Semble—That the infant's share did not pass

by the chattel mortgage, nor by the assignment for the benefit of creditors which was afterwards made, but that as C., the plaintiff, seized under an execution it must be assumed that his judgment was properly recovered.

Meredith, Q.C., and *Gibbons*, for the plaintiff.

Lash, Q.C., for the defendant.

Ferguson, J.]

[February 4.]

WRAY V. MORRISON.

Injunction—Owners in severalty of halves of a house—Implied grant—Natural right of support.

The facts of this case were peculiar. In 1878 G. W. conveyed by a voluntary deed to M. W., his wife, a certain lot of land in the City of Toronto, by metes and bounds. There were several houses on the lot, but no reference was made to them in the conveyance in any way. In 1883, also by a voluntary deed, M. W. reconveyed, by metes and bounds, to G. W. one half of the lot so conveyed by him to her in 1878. In this conveyance, also, no reference at all was made to the houses on the land. In 1884 M. W. died, leaving all her property, real and personal, to M., the defendant, an adopted child of herself and her husband, by general devise, not specifying any particular property. One of the houses above referred to, as being on the lot conveyed in 1878, was so situate that half the house was on the half of the lot reconveyed by M. W. to G. W. in 1883, and the other half was the half of the lot retained by M. W. Shortly after the death of M. W., the defendant M. began to threaten G. W. that she would pull down and demolish the half of the said house which was on the half of the lot claimed by her under the devise of M. W., and on January 8th, 1885, actually commenced to tear down the sheeting which was round the base of the said half of the house, with a view, as was naturally admitted, of carrying out her said threats.

G. W. now moved for an *interim* injunction to restrain M. from forcibly interfering with the house, or with one C., a tenant of the house, placed therein by G. W. in the lifetime of M. W., and for a mandatory order for repair of damages already done, and by consent the motion was turned into a motion for judgment. The plaintiff rested his case

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chiefly on the doctrines of implied grant, and the natural right to support.

Held, that the plaintiff was entitled to a perpetual injunction and order of restitution as asked.

A. H. P. Lefroy, for the plaintiff.

J. Tilt, Q.C., for the defendant.

PRACTICE.

Boyd, C.]

[Nov. 19, 1884.]

RE JOSEPH HALL MANUFACTURING CO.

Winding up order—45 Vict. c. 23 C.—Carriage in Master's Office—Jurisdiction of Master in Chambers.

On the application of Peter Ryan, a creditor of the Joseph Hall Manufacturing Co., the Master in Chambers on the 4th November made an order for winding up the Company, under 45 Vict. c. 23 C. Ryan's application was made by a solicitor who had formerly acted as solicitor for the Company.

Three other creditors of the same Company now applied to the Court for a similar order to that obtained by Ryan, and to set aside Ryan's on several grounds, or in the alternative for an order giving them the carriage of the proceedings under Ryan's order in the Master's Office.

Held, that it is preferable to have the winding up conducted by solicitors who are totally disconnected with the Company to be wound up.

It was not competent for the Master in Chambers to make an order under section 77 of the Act as amended by 47 Vict. c. 39, s. 5 C., referring the winding up to the Master in Ordinary. That may be done by a judge as in conformity with the usual course of proceedings in other causes and matters, but it is not the practice, save in one or two exceptional cases, to have references ordered by the Master in Chambers to the Master in Ordinary.

The intention of the Act is that the Master in Chambers, or Local Master, or Master in Ordinary may grant a winding-up order and conduct all the proceedings necessary therefor

in his own office and before himself as a judicial officer.

The carriage of the proceedings was accordingly given to the applicants.

William Roaf, for the applicants.

Moss, Q.C., for Ryan.

Dalton, Q.C. }
Rose, J. }

[Dec. 19, 29, 1884.]

MINKLER V. McMILLAN.

Discovery—Partner—Rule 224, O. J. A.

An action against an endorser of a promissory note brought by a member of the firm of bankers who discounted it. The firm was composed of two members only, B. & M. B. & M. dissolved partnership, and the action was brought after the dissolution in the name of M. only.

On the application of the defendant the Master in Chambers made an order under rule 224, O. J. A., for the examination of and the production of documents by B. as a person for whose immediate benefit the order was being prosecuted.

On appeal from this order.

ROSE, J., thought the evidence as to the interest of B. unsatisfactory, but refused to set aside the order of the Master, varying it however by directing that the examination of B., and his affidavit on production should not be used except for the purpose of discovery.

Millar, for the appeal.

Clement, contra.

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[Jan. 3.]

RE MCCALLUM V. GRACEY.

Prohibition—Division Court—Cause of action—43 Vict. c. 8, s. 8-12 O.

A motion for prohibition to the First Division Court of the County of Halton, on the ground that the defendants did not reside within the jurisdiction, and that the whole cause of action did not arise therein.

An action brought upon a promissory note by the administratrix of the payee against the executor and executrix of the maker.

The note was dated, "Milton, 17th September, 1877," and was for \$100 payable three months after date at Milton, with interest at

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per cent. per annum. The amount claimed was \$149.50.

The maker died in the County of Essex long after the maturity of the note; her will was proved in Essex, and the defendants at the time of the action resided in that county.

Held, that the death of the maker, the circumstances of her making a will appointing the defendants executors, and the proving of the will by the executors, were no part of the cause of action which was complete before the granting of the probate.

Held, also that the Court sought to be prohibited had jurisdiction by virtue of 43 Vict. c. 8, s. 8 and 12 O.

Aylesworth, for the motion.

Alan Cassels, contra.

Boyd, C.]

[Jan. 15.]

CAMERON V. CAMERON.

Production of documents—Unsent letters.

In an action to establish a will, which the defendants impeached for want of testamentary capacity and set up a prior will, the defendant included in his affidavit of production, as Nos. 19 and 20 in the schedule of letters, copies of letters, from himself to the testatrix, dated 29th December, 1882, and 8th March, 1883, but objected to produce them for inspection on the ground that they were never mailed or sent to their destination.

The Master in Chambers ordered the letters to be produced and the defendant appealed.

Held, that all memoranda and writings, or pieces of paper with writings on, which may throw light on the case, whether they would or would not be evidence *per se*, are subject to production unless they can be protected, and the mere fact in the case of a letter that it was not forwarded to its destination is no ground of exemption.

Huson Murray, for the defendant.

A. H. Marsh, for the plaintiff.

Rose, J.]

[Jan. 23.]

NAPANEE, TAMWORTH & QUEBEC RY. CO.
V. McDONELL.

Dismissing action—Want of prosecution.

Upon a motion to dismiss the action for want of prosecution the Master in Chambers ordered that the plaintiffs' statement of claim, filed pending the motion, should be allowed to stand as good and sufficient, and refused the motion to dismiss.

Upon appeal,

Held, that the filing of a statement of claim is not a sufficient answer to a motion to dismiss. The plaintiffs not having, in the opinion of the learned judge, sufficiently explained and offered excuse for a delay of nearly two years, and not having shown a probability of speeding the action, the learned judge allowed the appeal, and dismissed the action with costs.

McPhillips, for the appeal.

Lefroy, contra.

Rose, J.]

[Jan. 30.]

PLUMMER V. LAKE SUPERIOR NATIVE
COPPER CO.

Judgment—Foreign corporation—Liquidation.

Leave was given to sign final judgment under rule 80, O. J. A., against a company incorporated in England, having its head office there, and in process of liquidation there, but doing business and having assets and liabilities in Ontario.

Shepley, for the plaintiff.

Rae, for the defendants.

Galt, J.]

REYNOLDS V. BARKER.

Security for costs—Temporary residence.

An order for security for costs was made against the plaintiff by His Honour Judge Benson, Junior Judge of the United Counties of Northumberland and Durham, on the ground that the plaintiff resided out of the jurisdiction.

GALT, J., reversed this order, following *Redondo v. Chayter*, 4 Q. B. D. 453, where the plaintiff resided temporarily within the juris-

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diction for the purpose of bringing the action, and expressed his intention of remaining until the litigation was over.

R. W. Wilson, for plaintiff.

Wm. Kerr, Q.C., for defendant.

Osler, J.A.]

GIFFORD V. GIFFORD.

Appeal from award.

The defendant appealed from the award of His Honour Judge Benson on various grounds, the main one being that part of the plaintiff's account was wrongly allowed.

Held, following the case of *McEwan v. McLeod*, Ont. A. R. 239, that although appeal would lie from a consent order of reference, that in this case the arbitrator had made a fair award that should not be disturbed.

Holman and *R. W. Wilson*, for defendant.

Aylsworth, contra.

Dalton, Q.C.]

MERCHANTS' BANK V. MONTEITH.

EX PARTE STANDARD.

Insurance for wife and children—40 Vict. c. 20—Administrator not trustee of such moneys—Jurisdiction of Master—Payment into Court.

A testator insured his life for the benefit of his wife and children. The policy provided that the money should be payable as might be directed by will. The testator by will appointed executors and gave his wife the income of his estate for life, and after her death the corpus to his son. The executors renounced probate, and, after revocation of a prior grant to the son who was then a minor, administration was granted to the defendant P. The policy provided that the money might be payable to the executors or administrators. But the Act 47 Vict. c. 20, O. provided that such policy moneys to which infants were entitled should be payable to a "trustee, executor or guardian." P. claimed the moneys as administrator, whereupon the insurance company, under s. 15 of the Act and G. O. 197, and O. J. A. rule 541, applied to the Master in

Ordinary in Chambers for leave to pay the moneys into Court.

THE MASTER *held*, (1) That voluntary applications to pay in money may be made in Chambers. (2) That under O. J. A. rule 541a he had jurisdiction by virtue of the administration proceedings before him to make the order. (3) That by the renunciation of the executors there was no "trustee, executor or guardian competent to receive the share of the infant." (4) That the Act excluded the administrator from any claim to the fund, and his receipt would not be within the protection of the Statute. (5) That the administrator was not a trustee of the will, except as holding surplus assets, after administration with notice of a trust. (6) That the money was no part of the estate subject to the control of creditors and when paid in should be "ear-marked," and not mixed with the other funds of the estate.

On appeal by the administrator P.,

PROUDFOOT, J., reversed the Master's Order. *Rae*, for insurance company.

D. Black, for the infant.

J. A. Paterson, for the unsecured creditors for the motion.

J. MacGregor, for administrator and widow.

BOOK REVIEWS.

BRITISH COLUMBIA LAW REPORTS. Edited by P. Æ. Irving, Barrister-at-Law, under the authority of the Law Society of British Columbia.

MR. IRVING will be remembered by many in Toronto, and we can only say that if he proves himself as good a reporter as he did a cricketer, the profession in British Columbia may be congratulated. We confess we have not ourselves experienced any yearning for additional reports, but the learned judges of British Columbia are no doubt as competent to aid in the development of British Law as their brethren in other Provinces. These reports are issued in excellent shape, the size of the pages being considerably larger than in our own reports, which we think an improvement. So far as our perusal of the number sent enables us to judge we should say the reports were carefully prepared. In the case of *Peck v. Reg.* we stumble across a gem, Gray, J., dismissing a peti-

LATEST ADDITIONS TO OSGOODE HALL LIBRARY—FLOTSAM AND JETSAM.

tion with the words: "Without one harsh English expression, I may say, I know of nothing so adequately descriptive of the case as an old monkish couplet of the middle ages,

'Mel in ore, verba lactis,
Fel in corde, fraus in factis.'

Let the petition be dismissed with costs against the petitioners."

LATEST ADDITIONS TO OSGOODE HALL LIBRARY.

Chitty's Equity Digest, 4th ed., by William Grant Jones and Henry Edward Hirst, Vol. 1 containing the titles "Abandonment" to "Bankruptcy." London, 1883.

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Joint Stock Companies' Manual, for the use of Shareholders, Directors, and Officers of Companies, and the general public, by J. D. Warde, 1884.

FLOTSAM AND JETSAM

THE *Law Journal* says the £10,000 awarded to the plaintiff in *Finney v. Cairns* (otherwise Gar-moyle) is probably the largest amount of damages ever recorded in this country in an action for breach of promise of marriage. The nearest approach to it is £3,500, given in 1835 to a solicitor's daughter for the loss of the alliance of a solicitor who had inherited a considerable fortune from his father (*Wood v. Hurd*, 2 Bing. N. C. 166). In 1866 the sum of £2,500 was awarded to a milliner's daughter as compensation for losing a husband in the shape of a young gentleman with £700 a year. *Berry v. Da Costa*, 35 *Law Journal Report* C. P. 191; but there were circumstances in the case tending to make the damages exemplary. In former times apparently it was more common for disappointed husbands to bring actions than now, and in the reign of William and Mary £400 was awarded for the loss of a lady worth £6,000 (*Harrison v. Cage*, Carth. 467)—the largest sum we believe awarded by unsympathetic jurymen to a male plaintiff. No doubt as large, and perhaps larger sums than the present have been paid out of court; but we now have an assessment, agreed upon by all concerned and sanctioned by a jury, of a countess's coronet at £10,000.

NEW APPLICATION OF EQUITY.—Last December an officer of the School Board at Crewe made a proposal to the British Empire Mutual Life Assurance Company through their agent. The proposal was accepted, but the premium not paid. On the 8th inst., the proposed life was drowned through the breaking of the ice on which he was skating. It came to the knowledge of the directors that the deceased had made some arrangement with the company's agent for the payment of the first premium out of certain moneys due from the agent to him, and the company decided to consider the assurance as effected, and drew a cheque for the amount for which the deceased intended to assure.

LAW STUDENT WANTED

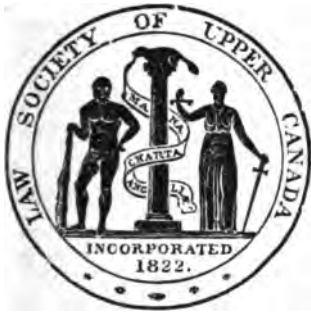
By a firm of Solicitors in Toronto, a Law Student about six months or a year under articles. No salary. Apply,

DRAWER, No. 2608,

TORONTO, P.O.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1884.

During this term the following gentlemen were called to the Bar:—Samuel Clement Smoke, William Durie Gwynne, Stephen Frederick Washington, Thomas Thomson Porteous, Alexander Duntroun McIntyre, Matthew Munsell Brown, William Grant Thurston, Thomas Edward Williams, John Stewart, Napoleon Antoine Belcourt, George Washington Field, Francis Henry Keefer, Douglas Armour, Flavius Lionel Brooke, Alexander Carpenter Beasley. The names are arranged in the order in which the candidates were called.

The following gentlemen were admitted as students-at-law:—Graduates, James Morris Balderson, Alexander Robert Bartlett, Joseph Hetherington Bowes, Samuel William Broad, George Filmore Cane, John Coutts, George Henry Cowan, Robert James Leslie, Archibald Foster May, John Mercer McWhinney, James Albert Page, Horatio Osmond Ernest Pratt, Thomas Cowper Robinette, Robert Karl Sproule, Ernest Solomon Wigle, James McGregor Young, Roderick James MacLennan, George Frederick Henderson, Samuel Walter Perry, Richard S. Box, William Wallace Jones, William Louis Scott, Edmund Kershaw. Matriculants: Henry Herbert Johnston, Albert E. Baker, Herbert Holman, Charles D. Macaulay, George Albert Thrasher, John Williams, Seymour Corley. Junior Class: Henry Elwood McKee, Edward Lindsey Elwood, Walter Scott MacBrayne, Edwin Owen Swartz, Joseph Frederick Woodworth, Owen Richards, William Allan Skeans, Richard Lawrence Gosnell, Frederick Ernest Chapman, Nathaniel Mills, James McCullough, jun'r., John McKean.

The following gentlemen passed the examination of Articled Clerks:—John Alfred Webster, Alexander William McDougauld.

BOOKS AND SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885.
- Arithmetic.
 - Euclid, Bb. I., II., and III.
 - English Grammar and Composition.
 - English History—Queen Anne to George III.
 - Modern Geography—North America and Europe.
 - Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- 1884.
- Cicero, Cato Major.
 - Virgil, Æneid, B. V., vv. 1-361.
 - Ovid, Fasti, B. I., vv. 1-300.
 - Xenophon, Anabasis, B. II.
 - Homer, Iliad, B. IV.
- 1885.
- Xenophon, Anabasis, B. V.
 - Homer, Iliad, B. IV.
 - Cicero, Cato Major.
 - Virgil, Æneid, B. I., vv. 1-304.
 - Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

Copies of Rules can be obtained from Messrs Rowsell & Hutcheson.

Canada Law Journal.

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No. 5.

DIARY FOR MARCH.

1. Sun.....*2nd Sunday in Lent.* St. David's Day.
2. Tues.....County Court (York) sittings. Osler, J., appointed 1879. Court of Appeal sittings begin.
3. Fri.....Name of York changed to Toronto, 1834.
4. Sun.....*3rd Sunday in Lent.*

TORONTO, MARCH 1, 1885.

THERE is a matter of some little moment which, we think, should be called attention to, viz., the practice springing up among certain of the short-hand reporters of the courts of attending when written judgments are delivered, and taking them down in short-hand, with a view of afterwards supplying what they are pleased to call copies. This is not only a usurpation on the province of the regular court reporters, whose duty and perquisite it is to supply copies of all written judgments, but it leads to exceedingly inaccurate versions of the judgments being circulated, to the perplexity of counsel and the vexation of the judges. The *fons et origo mali* no doubt is that students, when told to go to "the reporter" and procure a copy of such and such a judgment, do not understand that it is the reporter of the court who is intended, but straightway seek out one of the official short-hand reporters, and the latter, finding this the case, have, we suppose, devised the somewhat nefarious scheme above mentioned, and thereby put into their own pockets the fees which of right belong to the reporter of the court, and in return give, not a correct copy of the judgments delivered, but so much thereof as they have succeeded in taking down in short-hand.

WE have before us what appears likely to be the commencement of a most valuable addition to periodical legal literature in Vol. I. No. 1 of the *Law Quarterly Review*. The fact that it is edited by Mr. Frederick Pollock is itself sufficient guarantee of its character. The first article in the present number is on section 17 of the Statute of Frauds. It comprises some interesting introductory remarks on this section by Mr. Justice Stephens, followed by a digest in which the effect of the decisions upon it from 1676 to 1878 are given. To excite interest in the remarks of Mr. Justice Stephens, it may be sufficient to say that the conclusion he comes to is that the 17th section should be repealed, and the cases upon it consigned to oblivion. This article is followed by articles upon the Franchise Bill, by Sir William R. Anson, the King's Peace, by the editor, Homicide by Necessity, by Herbert Stephen, Federal Government, by Professor A. V. Dicey, and a number of other articles by distinguished writers. This is a new departure in periodical legal literature. We know of nothing of the same character as this *Review*, which has preceded it, and we feel sure that all who appreciate the intellectual side of the most intellectual of professions will welcome it with great rejoicing.

LORD COLERIDGE recently made some strong observations on what, he said, was a growing fashion of litigants conducting their cases in person which he considered in many ways open to objection. *Pump Court*, in referring to this, says it probably arises from the idea that the litigant will be allowed to state his case at greater length than would be permitted to counsel

THE LAY PRESS AS LEGAL CRITICS.

in his behalf. The writer continues "Perhaps, as the result stares them in the face, the curtness often amounting to rudeness, with which the Bar, especially the junior Bar, are treated by some judges, will receive a wholesome check." Time was when such a thing as rudeness, or even curtness on the part of the judges of Upper Canada was unknown. We are only repeating current talk amongst members of the Bar when we say that this cannot truly be said as to each and every of the judges of Ontario. The patient courtesy of Sir John Robinson was the severest rebuke to impatience or rudeness of either student or counsel, as well as the best example of what should be; the caustic polished reminder of a Draper was not given without necessity, and there was no malice in the quaint, blunt rejoinder of the kindest-hearted of men—Sir William B. Richards; but observations have been heard from the Bench during the past few years which, though clever enough, have been neither necessary, courteous, or edifying.

It is refreshing to read the healthy comments of the *American Law Review* on what the writer very happily calls the "blatherskite daily press." There was a time when it was considered to be the province of journalism to lead public opinion in the channel of thought of the purest and best thinkers of the day; the endeavour being to raise men's thoughts and aspirations to a higher level; but now the practice is for the daily press to give to the public the silly or vicious rubbish which the majority prefer, without any desire of helping them to the higher life or more ennobling thoughts of the minority. The text that our contemporary takes is the Adams-Coleridge suit, referred to recently by our English correspondent in much the same terms. He thus writes:—

"The secular newspapers hardly ever attempt to report a judicial trial without making egregious

blunders, unless they employ a stenographer and take down every word, including the *dictum* of the judge to the janitor to put some more coal in the stove: and they hardly ever undertake to criticize a judicial trial without making the same spectacle of themselves. This time, the whole American press seems to be running a race with itself, to see how ridiculous it can make itself seem to persons who are well informed on the particular subject in its criticisms on the ruling of Mr. Justice Manisty, of the English Queen's Bench Division, in what is known as the Adams-Coleridge libel suit. That suit grew out of this circumstance: A barrister named Adams paid suit to the only daughter of Lord Coleridge. The Hon. Bernard Coleridge, the eldest son of Lord Coleridge (not the son who was with Lord Coleridge in America—that was Gilbert Coleridge, his secretary), took upon himself to write a letter to his sister, admonishing her that her suitor was of bad character. She acted as girls are apt to act under such circumstances—gave the letter to her lover, and the latter was not ashamed to make it the basis of a libel suit against its author. The principal question was, whether this letter was what is known as a privileged communication, and, hence, not the subject of an action for libel. Mr. Justice Manisty ruled that it was a privileged communication; but in order to save the delay and expense of another trial, in case he should be over-ruled on this question of law by his judicial superiors, he put the case to the jury on the question of damages. They returned a verdict for £3,000. This verdict Mr. Justice Manisty immediately set aside, and reserved the question of the propriety of his ruling for the full court. This is the whole thing in brief, as nearly as we can gather it from the imperfect press dispatches. In ruling as he did, Mr. Justice Manisty did what is done in the English law courts every day. The only difference in this regard between the practice of an English court in a case at law and an American court, is this: The American court, under the same circumstances, would not have allowed the case to go to the jury at all, but would have non-suited the plaintiff. Then, in case of a reversal of this ruling, on error or appeal, a new trial, with the empanelling of a new jury would become necessary. The English practice is better adapted than ours to take a short cut to the final result, and save expense. If the highest court before which the propriety of Mr. Justice Manisty's ruling is brought for review should reverse his decision, there will be no new trial, but judgment will be entered on the verdict already rendered. This is the whole ground of the insane howl which went up from the rabble of London against the

SET-OFF IN JOINT STOCK COMPANIES.

aristocracy when this decision was pronounced, and which was re-echoed by the blatherskite daily press of America. The whole ground of the commotion turns out to be that a judge ruled, as a question of law, that if a brother write a letter to his sister admonishing her that one who is a suitor for her hand is a disreputable person, this is a privileged communication, and not the ground of an action for libel. Upon the propriety of this ruling we do not venture an opinion, not having examined the question; but we have a clear opinion that if this is not the law, the quicker it is made so the better. If a brother has not the right to write a letter to his only sister admonishing her that she is about to throw herself into the arms of a scallawag or a libertine, what person has a right to convey such information to her? That, we take it, ought to be the law in America, where there is no such a thing as *famly* in the sense in which it is understood among the nobility in England."

SET-OFF IN JOINT STOCK COMPANIES.

There is a marked want of uniformity of rule as to the right of set-off in the laws of the Province and of the Dominion respecting joint stock companies.

In Ontario, shareholders in companies incorporated under the Joint Stock Companies' Letters Patent Act, R. S. O. c. 150, while individually liable to the creditors of the company to an amount equal to their unpaid stock are allowed (s. 53, subs. 2) in actions brought by such creditors against them, to raise by way of defence, in whole or in part, any set-off which they could set up against the company, except a claim for unpaid dividends, or a salary or allowance as a president or director.

Neither the Joint Stock Companies' General Clauses Act, R. S. O. c. 149, ss. 35, nor the General Railway Act, R. S. O. c. 165, ss. 30, have any similar provision for set-off.

Nor is there any provision for set-off in the Dominion Companies' Act of 1869, 32-33 Vict. c. 12, ss. 33, or c. 13, ss. 42, or the Consolidated Railway Act 1879, 42 Vict. c. 9, ss. 23.

A clause similar to those in the Acts referred to in the last two paragraphs, viz., s. 80 of the "Railway Act" C. S. C. c. 66, was construed by the Court of Error and Appeal in *Macbeth v. Smart*, 14 Gr. 298. The Court reversed a decree of V.-C. Esten, and held, against the opinions of four Equity Judges, that a shareholder in a Railway Company could not set-off, in equity, a debt due to him by the company for moneys he had paid as surety for the railway company.

So in *Bemier v. Currie*, 36 U. C. R. 411, GWYNNE, J., held in an action by a creditor of a company against a shareholder that such shareholder could not set-off against his unpaid stock the amount of a judgment and execution held by him against such company; and that the decision of *Macbeth v. Smart* was in principle applicable notwithstanding that the shareholder having such judgment and execution could not by reason of his being such shareholder reach with his execution his own unpaid stock.

But in *Smart v. Bowmanville, &c., Company*, 25 C. P. 503, a company was held entitled in an action by an agent for his salary, to set-off the amount due by him as a shareholder for his unpaid stock.

The Dominion Act for winding up insolvent companies, 45 Vict. c. 23, provides (s. 60) that "the law of set-off as administered by the Courts, whether of law or equity, shall apply to all claims upon the estate of the company and to all proceedings for the recovery of debts due or accruing due to the company at the commencement of the winding up, in the same manner and to the same extent as if the business of the company were not being wound up under this Act."

The clause provides for the application of "the law of set-off as administered by the Courts" in the actions for the recovery of debts due (1) *by* or (2) *to* the company.

Except in respect of companies incor-

RECENT ENGLISH DECISIONS.

porated under the Ontario Letter Patent Act, which provides for set-off, *Macbeth v. Smart* may be held to define the law of set-off administered by the Courts in actions by creditors of a company against a shareholder for amount of his unpaid stock, and in so far as the proceedings taken by the liquidator under the Winding up Act against the shareholders of a company partake of the character of such an action, it is probable that case may be found to apply.

And in so far as the claims of creditors proveable against the company resemble the case in 25 C. P. 503, the law of set-off as administered by the Court in that case would enable the liquidator to set-off the amount of any unpaid stock due by such creditor as a shareholder in the company.

These anomalies render the administration of the Winding up Act difficult to both practitioner and judge, and call for legislative action so that the law may be made uniform as respects all classes of claim and all classes of companies.

RECENT ENGLISH DECISIONS.

PROCEEDING to the January number of the *Law Reports* we find they consist of 14 Q. B. D. p. 1-54; 10 P. D. p. 1-5; and 28 Ch. D. p. 1-102. Of the first two of these the only cases requiring notice are practice cases, which will be noted in another place. In the last the case of *Smith v. Land and House Property Corporation*, at p. 7, requires noting.

SPECIFIC PERFORMANCE—MISREPRESENTATION—
"DESIRABLE TENANT."

Here, in an action for specific performance of a contract for the sale of real estate, the defendants claimed cancellation of the contract or compensation on the ground of misrepresentation by the vendors. The misrepresentation consisted in a statement in the particulars that the

property "was let to a most 'desirable tenant.'" As a matter of fact, the vendors knew that the tenant had not paid his last rent, though over-due; and that he had only paid his last instalment but one after threats of distress, and by driblets; and this case shows (1) in the language of Bowen, L.J., that "a tenant who has paid his last quarter's rent by driblets under pressure must be regarded as an undesirable tenant"; (2) that, though it appeared that the words "a most desirable tenant" were inserted by the auctioneer without instructions from the vendor, this did not excuse the latter, for, in the language of Baggallay, L.J., at p. 13, it is "the duty of a vendor to see that the property is not untruly described, and he cannot be held to be excused because a description which the property will not bear has been inserted by the auctioneer"; (3) that where one is sent to a sale merely as an agent for the purpose of buying a property for the best price he can get it up to a certain sum, nothing that he may have heard or said on the occasion of the sale can be evidence against his principals, and therefore evidence was not admitted in this case to prove certain conversations alleged to have taken place between the auctioneer and such agent of the vendees, tending to show that he knew something to the tenant's disadvantage.

STATEMENT OF OPINION—STATEMENT OF FACT.

There are also in this case certain *dicta* of Bowen, L.J., at p. 15, which are worth remembering. He says:—"It is material to observe that it is often fallaciously assumed that a statement of opinion cannot involve the statement of a fact. In a case where the facts are equally well known to both parties, what one of them says to the other is frequently nothing but an expression of opinion. The statement of such opinion is, in a sense, a statement of a fact, about the condition of the man's

RECENT ENGLISH DECISIONS.

own mind, but only of an irrelevant fact, for it is of no consequence what the opinion is. But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he implicitly states that he knows facts which justify his opinion."

MATERIAL REPRESENTATION—REDGRAVE v. HURD.

Lastly, the well-known case of *Redgrave v. Hurd*, 20 Ch. D. 1, is commented on in this case by Bowen, L.J., in a way which calls for notice. He says:—"I cannot quite agree with the remark of the late Master of the Rolls in *Redgrave v. Hurd*, that if a material representation calculated to induce a person to enter into a contract is made to him it is an inference of law that he was induced by the representations to enter into it, and I think that probably his lordship hardly intended to go so far as that, though there may be strong reasons for drawing such an inference of fact. . . . *Redgrave v. Hurd* shows that a person who has made a misrepresentation cannot escape by saying, 'You had means of information, and if you had been careful you would not have been misled.'"

COMPANY — CONTRACT BETWEEN COMPANY AND SHAREHOLDERS — MEMORANDUM OF ASSOCIATION — SUBSEQUENT RESOLUTIONS.

The next case requiring note is *Ashbury v. Watson*, at p. 56, which may be briefly mentioned as showing, in accordance with previous cases, that no resolution of a company, special or otherwise, can alter the contract made between the company and all the shareholders as evidenced by the memorandum of association, so that, in this case, certain special resolutions passed by the company in 1872, altering the priorities and payments of the net revenue as between the preference and ordinary shareholders from these prescribed in the memorandum of association, were invalid; and though the fact that the special resolutions had been

acted upon till 1883, and dividends had been received on the footing of these resolutions, might prevent any shareholder who had so received such dividends from asserting a claim against the company for any larger payment during the period of such receipts, yet that could not amount to a ratification of an implied contract that the dividends in these shares should always be paid on the same footing.

WILL—"REAL ESTATE WHERESOEVER SITUATE"—LEASEHOLDS.

The next case requiring brief notice is *Butler v. Butler*, at p. 66, wherein a testator devised "my real estate wheresoever situate, the V. Park Cemetery excepted" upon certain trusts, and then disposed of "my freehold estate called the V. Park Cemetery, and my personal estate wheresoever situated" upon certain other trusts, and it was contended that by virtue of the section of the Wills Act corresponding to our R. S. O. c. 106, sec. 28, so much of his personal estate as consisted of leaseholds for years passed under the gift of the real estates. CHITTY, J., however, decided the contrary, remarking that it struck him as a very extraordinary thing that this argument should be adduced, as far as he was aware, for the first time somewhere about half-a-century after that Act came into operation. He refers to the fact that leaseholds for years are by the Act itself included in the definition of personal estate (R. S. O. c. 106, sec. 7, subs. 3), and observes that to his mind it would be a most extraordinary thing "that an Act of Parliament is to say, in a very cumbersome manner, that a gift of real estate, after the passing of this Act, shall include that which on the face of the Act itself is described as personal estate; that is to say that the Court is bound by reason of this section (R. S. O. c. 106, sec. 28) to impute to a testator, if he uses what I consider to be a technical term, a meaning different from

RECENT ENGLISH DECISIONS—OUR ENGLISH LETTER.

that which the Legislature has expressly and for the purposes of the Act imposed upon the term."

INFANT—EDUCATION—JURISDICTION.

The only remaining case requiring mention in this number of the Q. B. D. is *In re Montagu* at page 82. This was a summons on the part of the infant plaintiffs to have a scheme for their education and maintenance under which they were to be brought up as Protestants. The infants it appeared were in the custody of their mother, who was out of the jurisdiction, and who, jointly with two others, was their testamentary guardian. It was urged on behalf of the mother, who opposed the application, that even if the Court should be of opinion that the father intended the plaintiffs to be brought up as Protestants it would not make an order to that effect, because the mother who had control over them was resident out of the jurisdiction, and an order on her would be nugatory. PEARSON, J., however, made the order for the plaintiffs to be brought up according to the tenets of the Church of England, saying he would be sorry to impute to the mother any intention to set this Court at defiance, and adding: "But whatever that lady is inclined to do, the other guardians are entitled to have the decision of this Court to guide them. It by no means follows because they have not now that they will not hereafter have the control of the children, and they ought to know what it is proper for them to do, and on that ground alone I should have given my judgment in the case."

A. H. F. L.

OUR ENGLISH LETTER.

(From our own Correspondent.)

It is by no means necessary to tell the readers of THE CANADA LAW JOURNAL that by the death of James Bethune, Q.C., the legal profession in Canada has lost one of its brightest ornaments. But it may be some consolation, though it can be but slight, to know that English lawyers feel the loss with almost equal sorrow. Dr. Bethune had been here for some months before his death on important legal business, and he had impressed all who came into connection with him, not only with a profound conviction of his extreme ability, but also with a feeling of affectionate reverence. He was one of those men whom people at once admire and like. The steady pursuit of the law had not deadened his human sympathies or deadened the sociable side of his character. One fears that in England success does not often result in the formation of companionable men. The giants of the English Bar have not, for the most part, any such reputation as Dr. Bethune enjoyed; they become lawyers, *et præterea nihil*. What the reason may be I know not. Perhaps it is that the press of work upon a successful man is more than human geniality can bear; for we hear tales, some of which are not far from truth, of men, who, rather than lose a single brief, make a regular practice of getting up at four every morning, regardless of winter cold or summer heat, and who add hours to the working day, while they shorten the period of their natural life. In them the high ambition for professional fame absorbs the whole man, and the result is not altogether satisfactory; for, when all is said and done, a man should be something more than a lawyer if he is to serve his fellows, and do his duty in life. The life of Mr. Benjamin is a better example of the

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true *modus vivendi*. Work flowed into his chambers, but instead of allowing himself to become the slave of his clients he quietly raised his fees. He, as it were, said: "I am a legal instrument of the highest quality, effective beyond all others; if you require my services you must pay for them in proportion to their value." Thus it came that insignificant work flowed away from his chambers to those of ordinary men, and he was able to devote his almost superhuman intellect to the solution of legal questions of the first importance and the finest delicacy.

As usual during the Assizes, the lay press is full of complaints at the inconvenience and loss which the transaction of provincial business entails upon Metropolitan suitors. If one were to believe the papers, one would come to the conclusion that there was no such thing as business on circuit, and that nothing short of the absolute infatuation of the Bar, combined with the ill-fortune of the judges, kept the assize system going. But the fact is, that the press in general forms its estimate purely upon the criminal statistics, and is deliberately, or else very culpably, forgetful of the fact that such trifles as causes do exist. When these are brought to the notice of editors they are contemptuously described as being of a calibre entirely beneath the notice of a judge, as frivolous disputes between neighbours about landmarks, or as quarrelsome litigations. Yet, as a matter of fact, those who have most experience of circuit freely confess that a judge of assize is for the most part brought face to face with differences of a substantial kind. In the small places, indeed, the amount at stake is frequently not very large; but it is important to the parties, and it is a comparatively new and a remarkably pernicious doctrine, which is now obtaining a certain recognition, that the disputes of rich men are worthy of greater attention than those of

men of moderate means. Moreover, it is absolutely frivolous to say that the majority of London suits are important from any point of view. Not once or twice in the story of the last sittings did it happen that judges, both on the common law and equity side, galloped through their lists in the course of a morning simply because they were constructed of rotten material; but one never sees an absolutely frivolous case on circuit. The remedy is an increase of the judicial staff and not abolition of circuits.

Essays on the science of law reporting have been the amusement of the Bar and *The Times* during the Christmas vacation, and a fierce controversy has been going on respecting the comparative merits of long and short reports. Upon this matter the opinion of a law reporter may have a certain small value, in spite of the theory that artists are the worst critics in the world. His opinion is to the effect that reports are both too long and too short. Arguments are unduly curtailed, and judgments are diffusely expanded. Now, arguments often contain to the full as much pith as judgments, and from an educational point of view are more valuable. Judgments, on the contrary, especially those which are delivered off-hand, abound in repetitions, and sometimes in ill-considered expressions of opinion, which are ruinous when quoted as *obiter dicta* in subsequent cases. The fact is that Mr. Pitman and his followers have spoiled the art of law reporting and destroyed memory simultaneously. The old reports were far better drawn up than the verbose and lengthy productions now in vogue. In the old reports the pearls of principle were conspicuous, in the new every jewel is surrounded by a mass of meaningless dross.

Of the *personal* of the Bar and the Bench there is little to be written. There are no new judges and no new Queen's

OUR ENGLISH LETTER—SELECTIONS.

Counsel, the latter fact being the fault of Lord Selborne. His difficulties have been partially exemplified by the deplorable suicide of Mr. Nash, one of the applicants for silk, whose premature death was purely due to over-work, in the same way as the comparatively recent and equally deplorable death of Mr. Oppenheim. Both are instances of that incurable industry which ends in monomania; the last-named especially was a man who was known not to have taken a holiday for years except on Christmas day. It is only on this theory that one can explain the peculiar fact that the successful men commit suicide and the unsuccessful survive.

The complaints concerning the Courts still continue with unabated vigour, and the judges take the leading parts in the chorus of grumbling. Baron Huddleston has taken the despairing line and has ordered all the uncontrollable ventilators in his court to be hermetically sealed. Judge, then, of his horror when on the succeeding day, the Houses of Parliament and the Tower having been wrecked in the meantime, he saw two suspicious looking persons enter the gallery and leave it hurriedly; for his knowledge of science, small and purely forensic as it is, must be quite enough to teach him that an explosion is infinitely dangerous in a place where the atmosphere is confined within metes and bounds. However, we have to thank—not the forbearance of the enemies of society—but something higher, for the fact that the Royal Courts have, up to the present time, escaped the fate of the Houses of Parliament. It is a matter for deep congratulation, however, that the Legislature of the United States should, late in time, have realized their duty in regard to the dynamitard class. That undefined thing—the comity of nations—has certainly been very slow in making its appearance.

London, Feb. 2, 1885.

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It will be remembered that not long ago, a decision was rendered by the Supreme Court of Minnesota to the effect that the attachment of a seal to an instrument, in all other respects having the elements requisite to negotiability, destroyed its negotiable character. Though this opinion was consistent with the old theories underlying the doctrine of negotiability, yet, as everyone must have observed, it clashed with the modern view, which has received recognition by no less an authority than the Federal Supreme Court, that bonds have the same commercial character that their unsealed brethren possess. This question came before the Supreme Court of Pennsylvania, in *Kerr v. The City of Corry* not long ago. The lower court, relying upon *Diamond v. Lawrence County*, 1 Wright 353, adhered to the old view, and permitted the city to show that the bonds in suit were fraudulently issued, though Kerr was a *bona fide* purchaser thereof before maturity. The Supreme Court rejects the fossilized doctrine and places itself on the level of progress of the United States Supreme Court. It declines to be put in that position by which it would be made “to antagonize the sentiment of the commercial world, and the doctrine of every other court, whether in this country or England.” The court had not, of course, heard of the Minnesota decision. In concluding its opinion, the court summarizes the law upon bonds with reference to their negotiability thus:

“They have at least a *quasi* negotiability in these particulars; they pass by delivery, and the holder may sue in his own name; the transferee for value holds title as an original obligee; he cannot be affected by equities existing between the previous holders and the municipality of which he had no notice; neither can he be affected by the default of the officers issuing them, unless such default directly affects their power to make and put them upon the market.”—*The Central Law Journal*.*

* See *Bank of Toronto v. The Cobourg, etc., R. W. Co.*, 20 C. L. J. 49.—Ed. C. L. J.

SELECTIONS.

INTEREST ON COSTS.

A point of practice of some considerable interest to suitors is the question from what date the costs of an action bear interest. There is no doubt that the old equity rule was, that the interest ran, not from the date of the judgment, but from that of the certificate of taxation (see Seton, last edit. p. 130). At common law the matter was not quite so clear, and there were decisions which went to show that the date from which the interest ran was the date of the judgment. In *Schroeder v. Cleugh* (46 L. J. 365, C. P.; 35 L. T. Rep. N. S. 850), however, the question was considered by three judges of the Common Pleas Division, after the Judicature Acts had come into operation, and they decided in favour of the old equity rule. So the matter stood when the case of *Hyman v. Burt* (76 L. T. 425; W. N. 1884, p. 100) came before Mr. Justice Field in chambers, and he decided in favour of the right date being the date of the judgment. Lastly, the same point came up again before Mr. Justice Pearson, in *Landowners West of England, etc., Company v. Ashford*, on the 30th Oct., and the learned judge seemed inclined to decide in the contrary sense to Mr. Justice Field, but, on being told that the decision of Mr. Justice Field was supported by one of Mr. Justice Chitty in *Re The Atlantic Mutual Fire Insurance Company v. Huth* on the 21st Dec., 1883, Mr. Justice Pearson felt himself obliged to follow those authorities, which, he said, were too strong for him. It appears, however, that *Atlantic, etc., Company v. Huth*, was not a decision at all upon the date from which the interest ran, but upon the question whether, on the facts of the case, any interest at all ought to be paid on the costs or not. The point that the interest ought to run from the date of the judgment does not appear to have been argued or suggested, and Mr. Justice Chitty is stated to have said that interest ran by statute from the date of the certificate, and that the usual 4 per cent. interest must be paid from that date. But for the reference to *Atlantic, etc., Company v. Huth* it seems very probable that the decision of Mr. Justice Pearson would have been in accordance with that in *Schroeder v. Cleugh*,

so that, so far from the point being now a settled one, as would appear at first sight to be the case, it must be regarded as more doubtful than ever, and in an eminently fit condition for the handling of the Court of Appeal.—*Law Times*.

STREET OBSTRUCTIONS.

In *Champlin v. Village of Penn Yan*, 34 Hun, 33, an advertising banner, twenty-four feet wide and twelve feet deep, was suspended across one of the streets in the defendant village. The top was attached to a wire and ropes which were fastened to the tops of the building fronting on the street opposite to the banner. A rope led from one corner of the bottom of the awning post on the sidewalk, and one running from the other corner of the bottom was fastened to the sill of a window of a house. The jury found that the banner was an object likely to frighten horses ordinarily gentle and well trained. The banner had been up a considerable time. In an action by the plaintiff to recover damages sustained by being thrown from his buggy while his horse, which had been frightened by the banner while passing under it, was running away, *held*, that the defendants was liable. The Court said: "The argument presented by the defendants is this: That it is not the duty of a municipal corporation to remove objects suspended over the street fastened to supports wholly outside of the street, if they are elevated so high as not to actually obstruct the use of the road-bed or sidewalk. In this State the proposition, as stated, has never been approved by any reported decision, nor have I been able to find any rule or authority which supports the argument. I think the doctrine contended for was repudiated in *Hume v. Mayor*, 74 N. Y. 264. In that case the erection complained of as an obstruction to the street was an awning made of a permanent roofing of boards over the entire sidewalk, resting against the building and supported on the outer line by wooden posts standing in the ground, near the kerb-stone, and was used wholly for private purposes. This was held to be an unauthorized obstruction, or an encroachment upon the street, and the city was held liable to a person injured

SELECTIONS—WILSON V. IRWIN.

[Co. Ct.]

by its fall, for the reason that it was the duty of the city to remove it after notice of its erection. In the opinion of the Court, no point was made of the circumstances that a part of the structure was supported by a post standing in the street. The court referred to several Massachusetts cases, with approval, where hanging objects were supported by fastenings in the face of the buildings which were standing on the line of the street, which were held to be unlawful obstructions. The cases to which I refer are, *Pedrick v. Bailey*, 12 Gray, 161; *Day v. Inhabitants of Milford*, 5 Allen, 98. The Court, in commenting on these cases, said they are precisely in point upon the question whether such a structure, if in a dangerous position or condition, is a defect in the street, which a municipal corporation, in pursuance of its general duty, is bound to remove or repair. It has been repeatedly held that it is the duty of a municipal corporation to remove objects deposited upon the streets, the natural effect of which is to occasion accidents, frightening horses of ordinary gentleness, although the objects were placed wholly outside of the travelled part of the road-bed. In *Eggleston v. Columbia Turnpike Co.*, 18 Hun, 146, the Court remarked: The more common causes of injury and liability are structural defects or neglect to repair the road-bed; but a road may be also rendered unsafe, with consequent liabilities therefor, by unsightly objects placed or permitted to remain upon it, which are calculated to frighten animals employed thereon. See also *Sherm. and Redf. Neg.*, s. 338; *Morse v. Richmond*, 41 Vt. 435; *Winship v. Enfield*, 42 N. H. 199; *Dimock v. Suffield*, 30 Conn. 129; *Bennett v. Lovell*, 18 Alb. Law Four. 303; *Harris v. Mobbs*, id. 382. We are unable to discover any sensible reason for holding that an object permanently suspended directly over the travelled part of a highway, although fastened to supports outside of the limits of the same, is not an obstruction to travel, if it naturally tends to frighten horses of ordinary gentleness. Such an object drives travel from the street over which it is suspended, because discreet persons will avoid the risk and danger incident to an attempt to pass under the same. It endangers travel and makes it perilous to all travellers riding in conveyances drawn by horses. Such

an object placed in a place so conspicuous as this banner was, within the plain sight of horses, is to be distinguished from objects which are suspended over sidewalks and fastened to the face of a building, like a sign or a bracket fastened in the face of a building, on which traders display their goods, or a show-case standing in front of a store. In many of the cases cited the argument is rejected that a road-bed can only be rendered defective by something in or upon the road itself, as being narrow and unreasonable. See *Norristown v. Moyer*, 67 Penn. St. 365; *Groce v. City of Fort Wayne*, 45 Ind. 429; S. C., 15 Am. Rep. 262."—*Ex.*

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

CHANCERY DIVISION.

DIVISIONAL COURT.

Before the CHANCELLOR, and PROUDFOOT, J.

WILSON V. IRWIN.

New trial—Judgment at trial for default of attendance of plaintiff—Rule S. C. 270—Refusal of judge at trial to entertain application to reinstate the cause—Divisional Court, Jurisdiction of.

Where judgment was awarded at a trial in favour of a defendant, in consequence of the absence of the plaintiff, and an application was afterwards made to the judge at the sittings to reinstate the case which he refused to entertain.

Held, the plaintiff might, nevertheless, apply, under Rule S. C. 270, to the Divisional Court at its next sitting to set aside the judgment, and for a new trial.

[February 24]

This action was set down for trial at the special sittings before FERGUSON, J., at Toronto, which commenced in November, 1884. The action was placed on the peremptory list for trial on the 2nd December, 1884. The defendant appeared, but the plaintiff did not, and the action was dismissed. An application was afterwards made to FERGUSON, J., at the sittings, to reinstate the case, but he refused to entertain the application.

G. H. Watson, for plaintiff, now moved on notice to set aside the judgment and for a new trial.

Chan. Div.]

WILSON V. IRWIN—BELL V. MACKLIN.

[Chan. Div.]

Affidavits were filed, sufficiently excusing the non-appearance of the plaintiff at the trial, and disclosing a *prima facie* case on the merits.

Justin, for defendant, opposed the application. The Court has no jurisdiction to entertain the application. Under Rule S. C. 270, the application may be made to the judge at the trial, or to the Court in Toronto. The plaintiff adopted the first alternative, and applied to the judge at the sittings—he cannot now adopt the other alternative—the only remedy, therefore, he has now is to appeal to the Court of Appeal from the refusal of the judge at the trial to restore the case. This Court has no power to review the propriety of the refusal. *Re Galerno*, 46 Q. B. 379; *McTiernan v. Fraser*, 18 C. L. J. 341; 9 P. R. 246. The case is similar to *Hilliard v. Arthur*, 10 P. R. 281. In that case a substantive application was (subsequent to the decision of ROSE, J.) made to the Divisional Court for a new trial and was refused.

The CHANCELLOR.—I do not think the application to FERGUSON, J., is any bar to the present motion. That learned judge gave no decision upon the application. He simply said, in effect, the state of business before him was such, that he could not entertain an application to restore the case to be tried before him at that sittings. That left the matter at large, and the plaintiff, under the former practice at law, had certainly the right under such circumstances to apply to the full Court for a new trial, and there is nothing in the practice introduced by the Judicature Act depriving him of that right; and the Court should certainly struggle against a conclusion which would render it necessary for such an application as the present to be carried to the Court of Appeal. *Hilliard v. Arthur* appears merely to establish that a Judge in Chambers cannot entertain such applications as this. I think there should be a new trial on the usual terms of payment of costs of the application, and the costs occasioned by the plaintiff having made default.

PROUDFOOT, J.—I concur.

Order for new trial on payment of costs.

Before BOYD, C., and FERGUSON, J.

BELL V. MACKLIN.

Divisional Court, Chancery Division—Setting down motion under Rule S. C. 522, when unnecessary.

Where a cause had been set down by way of appeal to the Divisional Court of the Chancery Division, and had been subsequently struck out by order of a judge, an application made to the Court at the sittings for which the cause had been

set down, for leave to set the cause down at such sittings by way of appeal from the order striking it out of the list, was held to be an exception to Rule S. C. 522, and one not requiring to be set down.

This cause was set down by way of appeal to the Divisional Court of the Chancery Division at its sittings held in September, 1884. The cause stood over at that sittings, and was standing in the paper to be heard at the sittings to be held on the 4th December, 1884. In the interval between the September and December sittings an application was made to PROUDFOOT, J., to strike the cause out of the list which was granted.

Parkes (Hamilton), moved at the December sittings on notice for leave to set the cause down at those sittings by way of appeal from the order of PROUDFOOT, J. The motion stood over until the adjourned sittings in February, 1885.

H. F. Scott, Q.C., for defendant Foster, at whose instance the cause had been struck out, submitted that the motion should have been set down under Rule S. C. 522.

The CHANCELLOR.—We do not think this is a motion which is required to be set down. The object of the motion is to expedite the proceedings, and to get the appeal from the order in question heard sooner than it could otherwise be in the ordinary course; to require such a motion to be set down would practically defeat the object of the motion.

The motion was then heard on the merits, and leave granted on payment of costs of the motion.

RINGROSE V. RINGROSE.

The decision of PROUDFOOT, J., reported 10 Prac. Rep. 299, was affirmed with costs.

COMMON PLEAS DIVISION.

(Reported for the LAW JOURNAL by W. H. Deacon, Esq.)

TREEVENS V. SHIPMAN.

Illegally issuing marriage license.

Action by the father of a minor against an issuer of a marriage license for illegally issuing a license whereby the plaintiff's daughter was married while under age, and the father lost her services, and was otherwise injured.

Held, per CAMERON, C.J., C.P., that the action was not maintainable.

[Pembroke, Oct. 14, 1884.]

This action was tried at the Pembroke Fall Assizes, 1884, before CAMERON, C.J., C.P., and a

Com. Pleas.]

Teevens v. Shipman—Kean v. Cuddahee.

[Co. Ct.]

jury. The facts were that on the 8th July, 1884, a suitor of the plaintiff's daughter went with a friend to the defendant, who was duly authorized to issue marriage licenses in Ontario, for the purpose of getting a license to marry the plaintiff's daughter who was only eighteen years of age. The applicant told the defendant that the girl was only eighteen years of age, and that the plaintiff was not consenting to the intended marriage. The defendant said he would make that all right, and interlined the words "does not" in the affidavit made to procure the license so as to make it read "Bernard Teevens is the person whose consent to said marriage is required by law, and the said Bernard Teevens *does not* consent to the said marriage." The affidavit was sworn to in that form, and the license then issued upon which the plaintiff's daughter was, on the 14th of July, married without her father's knowledge or consent.

On these facts being proved, the learned judge intimated that the action would not lie, but some other witnesses were allowed to be called who proved that after the marriage the daughter returned to the plaintiff's house, and remained there until the 28th July, when her father consented to the union, and she and her husband went to a priest of the Roman Catholic Church and had her former marriage blest, it having been performed by a Methodist Minister and the parties being Roman Catholics.

M. J. Gorman, for the plaintiff, urged that the defendant was liable, as without his illegal act the marriage could not have taken place. That the plaintiff had an absolute right to withhold his consent, and that there could be no right without a remedy for the breach of it. That the defendant's act was similar to that of one who entices away a servant. He cited the following authorities among others:—*Evans v. Walton*, L. R. 2 C. P. 615; *Maunder v. Venn*, 1 M. & M. 323; *Jones v. Brown*, 1 Esp. 217; *Brassey v. McLean*, L. R. 6 P. C. 398; *Ashby v. White*, 1 Sm. L. C. 251-85; *Bonomi v. Backhouse*, 28 L. J. Q. B. 381; *Addison on Torts*, 39 *et seq.*; *Toms v. Whitby*, 35 U. C. R. 195-210; R. S. O. cap. 124, secs. 11 and 13.

The defendant did not appear, and was not represented at the trial.

CAMERON, C. J. C. P., *held*, that it did not necessarily follow from the illegal issue of the license that the parties would act on it by being married; nor did it necessarily follow from the marriage

that the girl would leave her father before coming of age. That the enticing away was the act of the husband and not of defendant, and that independently of the fact that the father consented to the union before the girl actually left his house, the action could not be maintained, but that the last fact put the matter beyond all question, and dismissed the action, but without costs, as defendant was not free from blame.

COUNTY COURT OF ONTARIO.

KEAN V. CUDDAHEE.

Transcript from Division Court—Irregularity therein—Sale of lands thereunder—Jurisdiction—Title to land.

A County Court Judge, sitting as such, has no authority to go behind the transcript and review the proceedings in the Division Court.

Held, that a return of *nulla bona* against the goods of the "defendant," there being more than one, is an irregularity, which would render the judgment void, but

Held, also, that as the lands had been sold, and the rights of the purchaser had intervened, the application must be refused, as there is no machinery to bring the sheriff's vendee before the Court, and the title to land would incidentally come in question.

This action was commenced by an attachment issued out of the Seventh Division Court of the County of Ontario against the defendants, as absconding debtors, and judgment was obtained therein.

This was made a judgment of the County Court of the County of Ontario by a transcript from the Seventh Division Court, and the lands were advertised and sold under this judgment, and the money paid over to the plaintiff.

The defendants (husband and wife, the land being in the latter's name) reside in Cleveland, Ohio, and had so resided since their departure from Canada, shortly before the commencement of the proceedings in the Division Court.

They now apply to set aside the judgment on the grounds: (1.) that the attachment was vexatiously and improperly issued; (2.) that they were not absconding debtors within the meaning of the Act; and (3.) that the transcript and judgment are irregular and defective, inasmuch as they set out that the bailiff returned *nulla bona* as to the "defendant," not saying which of them.

Co. Ct.]

KEAN V. CUDDAHEE—NOTES OF CANADIAN CASES.

[Chan. Div.]

The defendants moved promptly upon becoming aware of the proceedings, but the sale by the sheriff had previously taken place. There was no affidavit of merits, and the defendants did not deny the plaintiff's claim.

DARTNELL, J.J.—I do not think I can entertain this application on either of the two first grounds. Sitting as a judge of the County Court, I conceive I have no authority to review the proceedings of the inferior Court. The application should be made in the latter Court, and if the attachment and proceedings were therein set aside a subsequent application could be made to set aside the transcript and execution founded thereon. If I had to try the question upon the affidavits filed I would have no hesitation in arriving at the conclusion that the plaintiff had ample grounds for the issue of the attachment.

The third objection is more serious, and, except for the reasons I shall presently give, I should be prepared to set aside on this ground the transcript and judgment founded thereon. I have already held in the case of *The Ontario Bank v. Madill*, that in case there is more than one defendant the use of the singular "defendant" instead of the plural is a fatal defect, as there was no sufficient return of *nulla bona* against both the defendants. I fully agree with the observations of my brother Sinclair, where he says: "Great care should be observed in the preparation of the transcript under these sections, in view of the authorities referred to, and every attorney would consult the best interests of his client by a careful examination of it before filing." There is still more cogent reason for care where the proceedings are by attachment and the owner of the land has not been personally served, or become cognizant of what is being done to expose his land to be sold under the hammer of the sheriff.

But it seems to me that, the rights of third persons having intervened, I cannot interfere. There is no machinery for bringing the purchaser before this Court, and the transcript and judgment practically form links in the chain of his title. In such case the title to land would come in question. It was urged that no proceedings could be taken in equity until this judgment was successfully attached. I agree that where the judgment is void for irregularity only the equitable jurisdiction of the Court cannot be invoked to set it aside. But these defendants, I think, are not precluded by the facts, or by the results of this application, from commencing an action in which the plaintiff and the purchaser could be joined as defendants to set aside the judgment as being vexatiously and improperly obtained. See *Tait v. Harrison*, 17 Chy. 458.

The defendants admit the debt, and, as far as they are concerned, the question is only one of costs, as it has been stated before me that the purchaser is willing to reconvey the lands upon recovering back what he has paid.

I dismiss the application, but considering the circumstances, without costs.

J. A. McGilvray (Uxbridge), for the defendants.

J. B. Dow (Whitby), for the plaintiff.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

[Feb. 12.]

WEST V. PARKDALE.

CARROLL V. PARKDALE.

The judgment of WILSON, C.J., reported 22 C. L. J., 384, affirmed.

Per BOYD, C.—The village corporation has no capacity conferred upon it by municipal legislation to act as agents for other corporations. These municipalities have large original powers directly conferred by the Legislature involving the construction of, and the interference with, streets and highways within their territorial limits; but there is no law enabling them to act in the execution of such work as the representations of other limited corporations. So, on the other hand, whatever rights may be exercised by the railway companies under Orders in Council and Railway Acts, they as corporations have no power to delegate any part of these rights and privileges to municipal bodies, nor have municipal bodies any capacity to receive or exercise any such delegated functions. The action of the Parkdale authorities in this case was not as agents of the railways but as principals, doing work which the municipality was not legally authorized to undertake. As a corporation Parkdale entered into the construction contract with the people by whom the work was actually done, and so have become liable as a corporation for the injurious consequences to the plaintiffs resulting from that work.

Chan. Div.] NOTES OF CANADIAN CASES—NOTES OF RECENT CASES IN MANITOBA.

Per PROUDFOOT, J.—The Order in Council imposes no duty and confers no right upon the defendants in regard to the construction of the subway. It is strictly confined to the railway companies, and authorizes *them* to do all the works requisite.

The defendants were not acting under their municipal powers, for these did not extend to works beyond their own boundaries, as are the works in this case, and the proper steps had not been taken as required by the Municipal Act.

They may employ agents, engineers, overseers and workmen, but they cannot act in that capacity.

Assuming it to be necessary to show the act complained of to be within the scope of their authority, in order to make them liable therefor, it is shown here; for by taking the proper steps under the Special Act 46 Vict. c. 45 (O.), they might have executed the work in question. Not having done so they are trespassers, but within the scope of their authority, and therefore liable.

McCarthy, Q.C., *Osler*, Q.C., and *J. H. McDonald*, for the appeal.

S. H. Blake, Q.C., *Lash*, Q.C., and *Dr. Snelling*, contra.

Divisional Court.]

[Feb. 23.]

SMITH V. GRAY.

Foreign commission—When granted.

Held, on appeal, affirming the order of PROUDFOOT, J., that a commission should not be granted to take evidence abroad till after issue joined in the action, and not unless it be shewn on affidavit what evidence the party seeking the commission expects to obtain.

H. D. Gamble, for the defendant.

Arnoldi, for the plaintiff.

Boyd, C.]

[March 3.]

MILLER V. STILLWELL.

Held, following *Dayer v. Robertson*, 9 P. R. 78, and *Lowson v. Canada Farmers*, in *ib.* 185, that the time for appealing for an order of the Master in Chambers runs from the date of the decision, not from the date of the entry of the order.

W. M. Hall, for the defendant,

Watson, for the plaintiff.

PRACTICE.

Mr. Dalton, Q.C., }
Rose, J. }

[Feb. 11.]

McCULLOUGH V. SYKES.

A motion by the defendant to set aside an order for leave to issue execution in this action, made under the circumstances set out in the judgment of the Master in Chambers, was refused with costs,

Harman, for the motion.

George Bell and *C. E. Jones*, contra.

NOTES OF RECENT CASES IN
MANITOBA.

FROM MANITOBA LAW REPORTS.

Fencing railway—Accident—Liability of company.

Action for the value of an ox, killed by defendant's locomotive. The animal was on the prairie close to the track. The engineer reversed the engine and whistled, but, before the train could be stopped, the animal having got on the track, was run over and killed.

Held, 1. That the evidence did not disclose such negligence as would entitle the plaintiff to recover.

2. That where the land adjoining the railway is unoccupied, the company is not bound to erect fences at that part of their line.—*McFie v. Canadian Pacific Railway Co.*

Mandamus to purchase bridge—Bridge company—Local charter—Navigable river—Jurisdiction of Legislative Assembly.

By an Act of the Legislative Assembly of Manitoba, 45 Vict. c. 41, the Brandon Bridge Company was incorporated and empowered to build a bridge across the Assiniboine River; and, by another Act, 45 Vict. c. 35, incorporating the City of Brandon, power was given to the mayor and council to purchase any bridge built, or being built, within the city.

On an application by an adjoining land owner for a *mandamus* to compel the city to purchase the bridge,

Held, 1. The Act authorizing the building of the bridge was *ultra vires* of the Local Legislature.

2. That the title of the Bridge Company was not such as would be forced upon an unwilling purchaser.—*Re Brandon Bridge.*

NOTES OF RECENT CASES IN MANITOBA—LAW STUDENTS DEPARTMENT.

Criminal information—Foundation for libel—Public officer.

Held, 1. A criminal information will not be granted except in case of a libel on a person in authority, in respect of the duties pertaining to his office.

2. Where the libel was directed against M., who was at the time Attorney-General, but alleged improper conduct upon his part when he was a judge, an information was refused.

3. The applicant for a criminal information must rely wholly upon the Court for redress, and must come there entirely free from blame.

4. Where there is a foundation for a libel, though it fall far short of justification, an information will not be granted.—*Regina v. Biggs*.

Mortgage suit where mortgage assigned—Covenant by mortgagee for payment—Remedy against mortgagee as surety.

On an assignment of a mortgage, the mortgagees covenanted to pay the assignee all moneys secured by the mortgage, according to its terms, in the event of default being made by the mortgagors.

In a suit for sale the original mortgagees were made parties, and a personal order was asked as against them.

Held, 1. That no order could be made against the original mortgagees for immediate payment, but only an order for payment of any deficiency after a sale.

2. That the original mortgagees were entitled upon payment forthwith after decree of principal, interest, and the costs of an undefended action at law against them upon their covenant, to be discharged from further liability; and to an assignment of the plaintiff's securities upon payment of any costs he might have against the other parties.—*Taylor v. Sharp*.

Issue of patent on false representations—Acts in force in Manitoba.

Held, 1. Where a patent is issued in error, through the false and fraudulent representations of the patentee, he may be declared to be a trustee of the land for the party legally entitled thereto.

2. The laws in force in Manitoba have been as follow:

Up to 11th April, 1862, the law of England, at the date of the Hudson's Bay Company's Charter.

On 11th April, 1862, the law of England, at the date of Her Majesty's accession was introduced.

On 7th January, 1864, the law of England, as it stood at that date, was declared to be the law of Manitoba.—*Keating v. Moises*,

LAW STUDENTS' DEPARTMENT.

A discussion has been going on in the American legal journals as to the sort of education likely to be most beneficial to young men intending to enter the legal profession. Without at present offering any opinion on the subject we give the following extract from the *American Law Review*, one of the ablest legal periodicals published either in England or America:—

"Our able contemporary, the *American Law Record*, disagrees with us in the views expressed on this subject in our July-August number. It characterizes them as 'the American idea, the hot-house system, captivating but superficial.' We do not intend to renew the discussion, but we do think that it is unfair to characterize a system which directs the studies of a boy at an early age into the channel of his life work, as a hot-house system. It seems more appropriate so to characterize a system which consumes five or six years of vigorous youth in the acquisition of knowledge comparatively useless, and which does not bring the boy to the study of his profession until he has become a man, and feels the desire which every young man feels of becoming the head of a family and taking his proper station in society. The loss, the almost irreparable loss, of those five or six years drives him in the early stages of his manhood into a race to catch up lost time. This race involves in itself the study of his profession by the hot-house process; and while the attempt to learn the law in one or two years, which the college graduate, in a hurry to get married and established in his profession, makes, may not be 'captivating,' what he learns by such a process will certainly be 'superficial.' Our learned contemporary says:—

"It is begging the question to assert that the study of law by a boy between sixteen and twenty-one will indoctrinate him in the 'principles of the law to the extent which no after study can reach.' All the great lawyers of England have been University men, and we believe it will be found substantially the case in this country."

"This statement is erroneous in point of fact. All of the great lawyers of England have not been University men. Some of the greatest have not been. Lord St. Leonards was not. He was the son of a barber, and graduated into the law from the position of a sweep in a solicitor's office. Unless we are mistaken, Lord Tenterden was not. Sir John Barnard Byles was not, but he was engaged in mercantile pursuits until thirty years of age. The late Judah P. Benjamin, who before his death held briefs in more than half of the appeals in the House of Lords, was not. He entered Yale College, but did not graduate. Coming to this country, the statement of our contemporary is almost the reverse of true. Many of our very best lawyers and judges have not been University men. Chancellor Kent was; but, according to one of his private letters, the course of instruction in Yale, from which he was graduated, was, at that date, almost contemptible. We take it that the course of the St. Louis High School was better.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS—FLOTSAM AND JETSAM.

Charles O'Connor was not. Mr. Justice Miller was not, but there is not his equal on the bench of the great court in which he sits. Judge Dillon was not; but we have not a more learned or profound lawyer in America, or, it might now be added, a more successful one. The list might be indefinitely extended. The inquiry would show that an University education neither enables a man to become a great lawyer, nor does the lack of it prevent him from becoming such. What our colleges need is an elastic course of studies, which shall embrace a course of special preparation for each of the different learned professions, as well as a general course of study for those who have leisure and means and who aspire to be considered educated gentlemen. Such a course of study for a lawyer will embrace Latin, possibly French; but it will not embrace Greek, the higher mathematics, astronomy or navigation. It might as well embrace Hebrew, Sanscrit, architecture, civil and political engineering and theology."

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Discrimination in railway facilities and constitutionality of statute relating to railway traffic.

—*American Law Register*, July, 1884.

Liability of railway servant for illegal acts in course of his employment.—*Ib.*

Liability of railways and other public carriers for injury to live stock in the course of transit.—*Ib.*, Dec., 1884.

Bail in Criminal Cases (An exhaustive article referring fully to the English and American law and authorities).—*Criminal Law Mag.*, Jan., 1885.

Popular errors in the Law of Conveyancing—(Effect of deed *proprio vigore*—Trustee joining with married woman in conveyance of separate estate—Necessity for sealed instrument).—*American Law Review*, Nov.-Dec., 1884.

Liability of Municipal Corporations for negligence.—*Ib.*

The rights and duties of Corporations in dealing with stock held in a fiduciary capacity.—*Ib.*

American institutions and laws, being the annual address delivered before the American Bar Association by Hon. John T. Dillon.—*Ib.*, Jan.-Feb., 1885.

The right to emblements upon foreclosure of mortgages of real estate.—*Ib.*

English lawyers of recent times.—*Ib.*

The French Bar.—*Ib.*

Reformation in Equity of contracts void under the Statute of Frauds.—*American Law Register*, Feb.

Liability of medical practitioners for death caused by improper treatment.—*Ib.*

A synopsis of the more important Imperial Acts etc., relating to Manitoba and the North-West Territories.—*Manitoba L. J.*, Feb.

Seizure under bill of sale in default of payment on demand.—*Irish Law Times*, Dec. 27, 1884.

The Law of Commission.—*Ib.*

Overcrowding on railways.—*Ib.*

Compromise by executor.—*Ib.*

Dr. Johnson as legal adviser.—*Ib.*

Liability of Railway Companies for unpunctuality in running trains.—*Ib.*, Jan. 17.

Interdicts against dealing with particular traders.—*Ib.*, Jan. 24.

Owner's liability for his dog.—*Ib.*

Common words and phrases—Emoluments—Horse—Roadway, roadbed—Gunpowder—Reasonable doubt—Plying—Milk—Manual labour—Public place—*Albany Law Journal*, Feb. 7.

Presumption of marriage.—*Ib.*

FLOTSAM AND JETSAM.

LORD O'HAGAN, late Lord Chancellor of Ireland, died on 1st of February last at the age of seventy-three.

LORD PHILLIMORE, ex-judge of the High Court of Admiralty, died on 4th of February last at the age of seventy-five.

"SIR," said a fierce barrister, "do you on your solemn oath swear that this is not your handwriting?" "I think not," was the cool reply. "Does it resemble your writing?" "No, sir, I think it don't." "Do you swear that it don't resemble your writing?" "Well, I do." "You take your solemn oath that this writing does not resemble yours in a single letter?" "Y-e-s, sir." "Now, how do you know?" "Cause I can't write."—*Ex.*

"You hev heern, gentlemen of the jury," said an eloquent advocate, "you have heern the witness swar he saw the prisoner raise his gun; you hev heern him swar he saw the flash and heerd the report; you have heern him swar he saw the dog fall dead; you hev heern him swar he dug the bullet out with his jack-knife, and you hev seen the bullet produced in Court; but whar, gentlemen whar, I ask you, is the man who saw that bullet hit that dog?"—*Ex.*

FLOTSAM AND JETSAM.

ON one of the many official excursions made by boat to Fortress Monroe and Chesapeake Bay, Chief Justice Waite of the Supreme Court, Judge Hall of North Carolina, and other dignitaries of the bench were participants. When the government steamer had got fairly out of the Potomac and into the Atlantic, the sea was very rough and the vessel pitched fearfully, Judge Hall was attacked violently with sea-sickness. As he was retching over the side of the vessel and moaning aloud in his agony, the chief justice stepped gently to his side and laying a soothing hand on his shoulder said: "My dear Hall! can I do anything for you? just suggest what you wish," "I wish," said the sea-sick judge, "your honour would overrule this motion!" It is said that Henry Ward Beecher was once crossing the ocean in company with a sea-sick clerical friend, who complained bitterly of the voyage. To whom Bro. Beecher responded, "why, you know in grace we are always a-bounding." A clerical friend of ours, in crossing the English Channel, remarked to a sick friend, "This is a nasty bit of water." His friend, sadly gazing over the side of the vessel, replied, "It ought to be by this time."

ONE has to go away from home to learn the news. An exchange (which is very much distressed that Canada is part of the British Empire and not one of the States of the Union) tells us almost in tears that "the Governor General (of Canada) is a foreigner; so is the able Prime Minister, Sir John A. McDonald; so, unless we are misinformed are other members of the Cabinet. Our information is that many commercial houses in Canada are merely branches of English houses; that the best situations in these houses are filled by young Englishmen sent out for that purpose, and we certainly know that young and enterprising Canadians are crowded out into the States in large numbers where they find more elbow-room and less English competition." As our contemporary apparently desires to "believe a lie" rather than otherwise, it is a pity to undeceive him, but a little investigation would have shown him that there is a false statement in every sentence in the above absurd paragraph. We are surprised that the editor of a really excellent and most readable periodical should allow some joker to make his pages ridiculous.

SOME twenty years ago it was held in *Reg. v. Collins*, that if a pickpocket puts his hands into your pocket with intent to steal whatever he finds there, he cannot be convicted of an attempt to

steal, if the pocket has really nothing in it. On the authority of this case, Mr. D'Eyncourt the other day refused to commit for trial a "well-known London pickpocket," who was so overwhelmed with surprise at this view of the law as to fall into a fit at once. But was the magistrate quite right? Mr. Justice Stephen, in his "Digest of the Criminal Law," "submits" that in such a case the pickpocket, although he does not in law attempt to steal, commits an assault on the owner of the pocket with intent to commit a felony; and, looking to the expediency of discouraging pickpockets as much as possible, we cannot but think that a committal would have been justified. Again, even in *Reg. v. Collins*, it was admitted that had a question been submitted to the jury whether there was anything in the pocket which might have been taken, and they had found that there was, the indictment might have been sustained. Now the evidence before Mr. D'Eyncourt appears to have been that of a policeman, who said not that the pocket was empty, but that he did not know it to contain anything. The pickpocket, be it remembered *had pleaded guilty*.

AN extraordinary instance of the peculiarity of Chinese notions of justice, as embodied in the law of the land, has occurred at the Mixed Court at Shanghai. An old man, clothed in rags, was brought before Huang and Mr. Giles, and charged with attempting to commit suicide by drowning himself in Soochow Creek. The accused's son, a cleanly looking youth, appeared to give evidence against his father, and was at once ordered by Huang to go down on his knees before the bench. Mr. Giles remarked that it appeared to be the Chinese custom when a son charged his father with any offence to make him go down on his knees like an accused person, and this being so, he thought it best not to interfere. The circumstances of the case were then explained to the court. It was stated that the son was an assistant in a barber's shop, earning the munificent salary of 900 cash a month in addition to his food. Out of this he helped to support his father; but the old man was not satisfied with what he got, as his son had promised to let him have 12,000 cash a month—an amount rather difficult for the boy to pay out of a monthly salary of 900 cash. The old man upbraided his son for walking about in good clothes, while his poor father was in rags, and announced his intention of committing suicide in consequence of his son's unfilial conduct. The son, fearing that the old man would carry out his intention followed his father to the edge of Soochow Creek, when the father seized hold of the boy and jumped into the

FLOTSAM AND JETSAM.

water, dragging his son with him. Luckily the water was shallow and the boy was strong, so he managed to land both himself and his progenitor safely on the bank. His worship, having heard this story, to the amazement of all the foreigners in court, ordered the boy who had saved his father's life to be rewarded with 100 blows. Huang explained to Mr. Giles that it was a principle in Chinese law when a son prosecuted his father to begin by giving the son 100 blows. Chief Inspector Cameron, anxious to save the boy from his undeserved punishment, explained that the police were the prosecutors in the case, and that it was only at their instigation that the boy gave evidence; and Huang then graciously remitted his sentence, at the same time handing over the would-be suicide to the fostering care of his son, who will apparently have to maintain his father out of his slender income of about ten dollars per annum.

Another instance, no less extraordinary, of peculiar justice, as administered in China, shows that the ladies at all events have some pretty substantial rights. This appears by the recent decision of a Court in Foochow. A man being convinced that his wife was unfaithful to him prepared to kill her—a remedy which the law sanctions. His unworthy spouse, however, was too quick for him, and, instead of allowing her husband to kill her, she killed him. This was also recognized by the court as one of the rights which belong to condemned wives, when they can exercise them; and on the conclusion of the trial the woman was dismissed with a reprimand for not having immediately informed the authorities of her husband's death, and thus made arrangements for his burial.

A "BARRISTER" has written as follows to the *London Times* with reference to the *Law Reports* :—

"What, apparently, is wanted is some definite responsible head who should be able and powerful enough to say that this or that case shall or shall not be reported; some one, in fact, to stand between those who wish their cases to be reported and the unfortunate profession who have to read them. I think almost every one will agree that if one-half of the present cases in the Chancery Division were either cut out altogether or cut down to reasonable limits the reports would be all the better for the process. What is the use of reporting the judgment of a judge of first instance at a length, say, of six pages, when one and a-half suffice for the judgment of the Court over-ruling him? What

is wanted is something between the old system and the present, and I would suggest: (1) *That one responsible editor, or two, if necessary, be appointed at a salary or salaries sufficient to make it worth the acceptance of a first-rate man.* (2) *That the reports come out quarterly instead of monthly.* (3) *That it be entirely in the discretion of the editor or editors what cases shall be reported.* (4) *That the reporters be directed to excise argument and unnecessary portions of judgments as much as possible, and not to report every case with witnesses simply because it is one; and I suggest that judges in the Chancery Division, especially, be requested to shorten their judgments as much as possible. I feel sure if this were done the reports would be vastly improved, and lastly, but by no means least, the principles upon which a case is decided would be more looked to than they are now. Owing to the multitude of reported cases, diligent search is now made to find a case whose facts are on all fours with the one to be decided, while half a dozen are passed over in which the principle is precisely the same."*

At a recent meeting of the Judges the absence of a distinguished Lord Justice was stated, by the last of the Vice-Chancellors, to be due to his having other fish to fry; whereupon a learned brother declared that, notwithstanding a popular belief to the contrary, BACON was incurable.

The Lord Chief Justice wished it to be understood that he had no objection to being addressed as "Duke Coleridge," though another judge expressed great annoyance at being styled KAY, C. B., to which title he observed he could not (strange to say) lay any claim.

The genial Sir Richard arrived in a very old gown, which he admitted was a very "Baggallay" array, but apologised for on the ground that it might have been worse—it might have been COTTON.

Mr. Justice Stephen announced that on that occasion he did not propose to offer any "Commentaries."

Sir Henry Hawkins was obliged to run away to play "Old Harry" with a few murderers.

A barefaced Baron felt satisfied that the presence of his brother GROVE would not prevent their enjoying a fair FIELD.

Denman explained that, in calling out D—BRET, he was not alluding to the Master of the Rolls, but was merely asking for a peerage.

The meeting congratulated itself on possessing the light of DAY and a NORTH aspect, but was so prolonged that one member had to CAVY in.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.

During Michaelmas Term the following gentlemen were called to the Bar, namely:—John Alexander Mackintosh, Adam Carruthers, Arthur Burnaby, Henry Herbert Collier, James D. L. C. Robertson, John Douglas, James Alexander Hutcheson, Joseph Alphonse Valin, James Caesar Grace, David Thorburn Symons, Dyce Willcocks Saunders, William Torrance Allan, Edmund Weld, Thomas Bulmer Bunting, William Navis Sorley, Isaac Norton Marshall, Frank Russell Waddell, Thomas James Decatur, Alexander George Frederick Lawrence, George Weir, William James Nelson, William David Jones, William Acheson Proudfoot, David F. McArdle; and the following gentlemen were admitted to the Society as Students-at-Law, namely:—Graduates: Frank Ambridge Drake, George Watson Holmes, Arthur Stevenson, Herbert Langell Dunn, John Frederick Dumble, Nicholas Fenar Davidson, Clement Rowland Hanning, Edward Holton Britton. Matriculants: Alexander Clarke, Henry Augustus Wardell, Herbert Ferdinand Bowie, Duncan Henry Chisholm, Fergus James Travers, John Thomas Hewitt, Richard Vercoc Clement, James Alexander Haight Campbell, Robert Lazier Elliott, Robert Gordon Smyth. Juniors: George Carnegie Gunn, Herbert William Lawlor, James Arthurs, William Pinkerton, George Davey Herd, Forbes Beyne Geddes, Robert Elliott Lazier, Frederick Forsyth Pardee, William Locklin Billings Lister, Reginald Murray Macdonald, Ernest Edward Arthur Duvernet, Frank Stewart Mearns, Arthur Trollope Wilgress, Stephen Dunbar Lazier, Robert Segsworth, James Henry McGhie.

During Hilary Term, 1885, the following gentlemen were called to the Bar, namely:—Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry Hubbs, Henry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurchy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Forbes Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, E. A. Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manly German, George McLaurin, and the following gentlemen were admitted as Students and Articled Clerks, namely: Graduates, John Henry Cosgrove, Alexander Henderson, Jr.; John Arthur Tanner, Francis Alexander Anglin. Matriculants: Alfred E. Cole, Dioscore J. Huteau, William Charles Mikel. Juniors: William Henry Moore, George Washington Littlejohn, Arthur N. George Ellis, George Smith McCarter, William Albert Smith, Ernest Napier Ridout Burns, Edmund Sheppard Brown, John Patrick O'Gara and William Walton passed the Articled Clerk's examination.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885. { Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884. { Cicero, Cato Major.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnehose, Lazare Hoche.

or NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Gov-

LAW SOCIETY OF UPPER CANADA.

ernment in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchers, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third

Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above ..	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

Copies of Rules can be obtained from Messrs. Rowse & Hutcheson.

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No. 6.

DIARY FOR MARCH.

- 15. Sun..... 4th Sunday in Lent.
- 17. Tues..... St. Patrick's Day.
- 18. Wed..... Princess Louise born, 1848.
- 22. Sun..... 5th Sunday in Lent.
- 23. Mon..... Sir George Arthur, Lieut.-Gov., U. C., 1838.
- 25. Sat..... Canada ceded to France, 1632.
- 29. Sun..... Palm Sunday. The Wills Act assented to, 1873.
- 30. Mon..... B.N.A. Act assented to, 1867.
- 31. Tues..... Lord Metcalfe, Governor-General, 1854.

TORONTO, MARCH 15, 1885.

HON. ANDREW STUART, Judge of the Superior Court of the Province of Quebec, has been appointed Chief Justice of that Province in the place of Hon. William C. Meredith.

We publish in another place a letter from an old and valued contributor in reference to a question which must from time to time crop up, viz., Standard time. Anything that our correspondent writes is worthy of careful perusal, and he has given a great deal of attention to this particular matter, as his letter plainly shows. Some railway men may dissent from his views, but they must commend themselves to those connected with the administration of justice and business connected therewith.

THE English *Law Times* makes the following judicious observations in reference to the late Lord O'Hagan :

"The career of Lord O'Hagan, rightly read, is pregnant with lessons to the most bitterly prejudiced of our compatriots in Ireland. He was a Roman Catholic, he identified himself with the Repeal Association in 1845, he defended O'Connell when he and others were indicted for conspiracy,

he defended Father Petcherine against the prosecution of the Crown, he defended the Phoenix conspirators, who were precursors of the Fenians. Notwithstanding all this he passed from one high office to another, until he at length found himself one of the very few Roman Catholic Peers in the Kingdom who have been created since the Emancipation Act. All this is natural and proper. There is no government in the world which recognizes more clearly than the English the fact that a man is not to be punished, but rather rewarded, for fearless conduct in his professional career. But there is a certain nobility in the recognition which in this case is conspicuous and exemplary, and it will not be amiss if Irishmen are taught to appreciate, that we in England regard as a matter of course, the fact that administrations honour, substantially no less than cordially, professional excellence irrespective of the cause in which it is displayed."

We are glad to know that the same just and liberal view prevails in Canada, and that an advocate need never fear that the courageous and honourable advocacy of an unpopular cause, will ever retard his professional advancement. It would indeed be a fatal blow to our justly prized liberties if any other policy should unhappily prevail.

SOME one defines language as an instrument, cunningly devised, for concealing thought, of which we are reminded by reading the head-note of the case *In re Ainslie*, in the January number of the Chancery Division of the Law Reports, which is as follows:—"At the death of a testator, the owner in fee of larch plantations, a large number of the larch trees had been more or less uprooted by extraordinary gales: *Held*, that trees which might continue to live but could not grow as ordinary trees, belonged to the executor, and trees that would continue to grow, but would have to be cut for the

RECENT ENGLISH DECISIONS.

proper cultivation of the plantations, belonged to the tenant for life under the will." By a severe effort we can arrive at a faint idea of "a tree which may continue to live, but cannot grow as an ordinary tree;" but when it comes to "a tree which will have to be cut down, but yet will continue to grow," we confess ourselves beaten. If the learned reporter had been content to follow the words of the judgment he would have produced a better head-note.

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PASSING to the February number of the *Law Reports* they are found to consist of 14 Q. B. D. p. 53-227; 10 P. D. p. 5-19, and 28 Ch. D. p. 103-185. In the former there are two cases of great interest and importance, bearing some relation to each other, the first of which is *Mitchell v. Darley Main Colliery Company*, p. 125.

CAUSE OF ACTION—ACTION IN RESPECT OF SECOND INJURY ARISING FROM SAME ACT AFTER RECOVERING DAMAGES FOR A PREVIOUS INJURY—STATUTE OF LIMITATIONS.

In this case the plaintiff was the owner of the surface of certain lands, of which there had been a subsidence in 1868, caused by excavations made about that time by the defendants who were then working a seam of coal lying under the plaintiff's land, or under adjoining land. That subsidence produced certain injuries which were repaired or paid for. The defendants never afterwards continued their excavations, and nothing further took place for twelve or thirteen years, when there was a further distinct subsidence in 1882 causing appreciable damage, and the plaintiff brought the present action to recover compensation for damages caused by the latter subsidence, whereupon the defendants pleaded that the alleged causes of action did not arise within six years before the commencement of the action, and that

the plaintiff's right to sue was barred by the Statute of Limitations.

Thus, in the language of Bowen, L.J., at p. 135, the question arose, What was the cause of action in respect to the subsidence in 1882? Was it the original excavation in 1868, or the subsidence in 1882, or a combination so to speak of the two? The Court, consisting of Brett, M.R., Bowen and Fry, L.J.J., agreed in holding that the plaintiff was entitled to maintain an action for the damage done in 1882, and that his right to sue was not barred by the Statute of Limitations. The argument of the plaintiff was that the *causa causans*, that is, the excavating by the defendants of their minerals, gave the plaintiff no right of action at all in either case; but that the two different results of it had given the plaintiff two causes of action, and that, although it is true to say that for the same cause of action successive actions for damages cannot be maintained, yet there may be any number of successive causes of action. That was the whole dispute, between the parties, and the Court upheld the plaintiff. This is held to be the logical result of the decision of the House of Lords in *Blackburne v. Bonomi*, 9 H. L. C. 509. In the case of *Blackburne v. Bonomi*, says Brett, M.R., at p. 130, "The question put to the judges was, in effect, that if there is only one subsidence, the result of one excavation, is the Statute of Limitations to run from the time of the excavation or from the subsidence, the words of the Statute of Limitations being that an action must be brought within six years after the cause of action accrued? . . . The House of Lords held that the excavation was not originally a wrongful act, and because it is not originally a wrongful act, it is not made a wrongful act by something happening subsequently. An act which is right at the time when it is done cannot be turned into a wrongful act by some-

RECENT ENGLISH DECISIONS.

thing that happens subsequently. Therefore, it was held that the excavation was not the cause of action; it was only the cause of the cause of action, the cause of action was the subsidence and that alone. The defendant had so used his property as to make the plaintiffs' property subside, and it was the making their property subside which was the cause of action." In the words of Bowen, L.J., at p. 136, in *Blackburne v. Bonomi*, "it was decided that the true character of the right of support is this, not that the person who had the land which was supported, and which demanded support from his neighbour, had an absolute right to support, the interference with which was a disturbance of property and gave a right to an action in respect of *damnum*, but that what he was entitled to was something different, the right to the ordinary enjoyment of his own land, and that the right to support was a right only to support so far as was necessary to enable him to enjoy his land in the ordinary way. From that it seemed to follow that until there was an interference with the enjoyment of the land there was nothing of which the plaintiff could complain." In accordance with what was decided in that case, and as a logical result thereof, the Court now held that each subsidence was a new cause of action, although the *causa causans* of each subsidence might be the same. But, as suggested by the judgments, it might be argued that the *causa causans* was not the same. The *causa causans* of the first was the excavation, the *causa causans* of the second was, as a matter of fact, the excavation unremedied, or the combination of the excavation and of its remaining unremedied. The result of the whole matter seems put very clearly by Fry, L.J., at p. 239: "With reference to principle, it appears to me to be plain that all damages which result from one and the same cause of action must be recovered at one and the same time, and therefore we are

driven to the inquiry what is the cause of action in a case of this description. As has been pointed out by Bowen, L.J., very clearly, there are two possible ways of stating that cause of action. It may be said that the subsidence attributable to the defendants is itself an interference with the plaintiff's enjoyment of his property, and as such is the cause of action in itself, or it may be said that the cause of action is the defendants' allowing the cavity to continue without giving proper support to the super-adjacent land, and the damage which follows from that circumstance to the plaintiff. To my mind it is not very material to inquire which of the two is the more accurate way of stating the cause of action. Like Bowen, L.J., I incline to consider that the more simple and more correct mode of statement is to say that the subsidence of land, attributable either to the acts or default of the defendants, is itself an interference with the plaintiff's enjoyment of his own property, and as such constitutes the cause of action. But even if the other point of view may be the more just one, it appears to me that the cause of action for the second subsidence is really not the same as the cause of action for the first subsidence. Because what is the cause of action in the case of the first subsidence? I think withdrawing the stratum of coal without leaving or placing proper supports. It is really the act of omission to leave or place proper supports which gave rise to the cause of action. The mere withdrawal of the stratum of coal in itself is a perfectly legitimate and lawful act, and it is only because it is done without doing something else which would prevent the injury to the plaintiff that the cause of action arises."

CAUSE OF ACTION—SEPARATE ACTIONS IN RESPECT OF SAME—WRONGFUL ACT—DAMAGE ON PROPERTY AND INJURY TO PERSON.

The second case, above alluded to, is *Brunsdon v. Humphrey*, p. 141. Here the

RECENT ENGLISH DECISIONS.

facts shortly stated were as follows: the plaintiff, whilst he was driving his cab, came into collision with a van of the defendant, through the negligence of the defendant's servant, whereby he sustained bodily injury and his cab was damaged, and the plaintiff, before the present action, sued the defendant for damage to his cab in the County Court, and the defendant paid into the Court a small sum which was accepted, and thereupon the action in the County Court was discontinued. The plaintiff then brought the present action, and judgment was entered for him at the trial. The Queen's Bench Division, however, made absolute a rule to enter judgment for the defendant, and the plaintiff now appealed to the Court of Appeal, which held that the plaintiff could maintain his action, and was entitled to have the judgment entered at the trial in his favour restored. The effect of the decision is thus given in the head-note: "Damage to goods and injury to the person, although they have been occasioned by one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action; and therefore the recovery in an action of compensation for the damage to the goods is no bar to an action subsequently commenced for injury to the person." At page 145, Brett, M. R., says: "Different tests have been applied for the purpose of ascertaining whether the judgment recovered in one action is a bar to a subsequent action. I do not decide this case on the ground of any test which may be considered applicable to it, but I may mention one of them; it is whether the same sort of evidence would prove the plaintiff's case in the two actions. Apply that test to the present case. In the action brought in the County Court, in order to support the plaintiff's case, it would be necessary to give evidence of the damages done to the plaintiff's vehicle. In the present action it

would be necessary to give evidence of the bodily injury occasioned to the plaintiff, and of the sufferings which he had undergone, and for this purpose to call medical witnesses. This one test shews that the causes of action as to the damages done to the plaintiff's cab, and as to the injury occasioned to the plaintiff's person are distinct." A passage from the judgment of Bowen, L.J., at p. 150 *seq.*, will clearly shew the connection between this and the last case: "Two separate kinds of injury were in fact inflicted, and two wrongs done. The mere negligent driving in itself, if accompanied by no injury to the plaintiff was not actionable at all, for it was not a wrongful act at all till a wrong arose out of the damages which it caused. One wrong was done as soon as the plaintiff's enjoyment of his property was substantially interfered with. A further wrong arose as soon as the driving also caused injury to the plaintiff's person. Both causes of action, in one sense, may be said to be founded upon one act of the defendant's servant, but they are not on that account identical causes of action. The wrong consists in the damage done without lawful excuse, not the act of driving, which (if no damage had ensued) would have been legally unimportant."

. . . The view at which I have arrived is in conformity with the reasoning of the judgment recently pronounced by this Court in the case of *Mitchell v. Darley Main Colliery Co.*, where it was held, reversing *Lamb v. Walker*, 3 Q. B. D. 389, that each fresh subsidence of soil in the case of withdrawal of support gave rise to a fresh cause of action. Nor do I feel called upon to extend the application of this sound and valuable principle of law, that none shall be vexed twice for the same cause of action, to a case to which it has never yet been applied, and to which it can only be applied by pursuing analogies to lengths which would involve practical

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injustice." It must be added that in a short judgment, Lord Coleridge, C.J., intimates his dissent from his learned colleagues, saying, "It appears to me that whether the negligence of the servant, or the impact of the vehicle which the servant drove, be the technical cause of action, equally the cause is one and the same; that the injury done to the plaintiff is injury done to him at one and the same moment by one and the same act in respect of different rights in his person and his goods, I do not in the least deny, but it seems to me a subtlety not warranted by law to hold that a man cannot bring two actions if he is injured in his arm and in his leg, but can bring two, if besides his arm and leg being injured his trousers which contain his leg, and the coat sleeve which contains his arm have been torn. The consequences of holding this are so serious, and may be very probably so oppressive, that I at least must respectfully dissent from a judgment which establishes it."

A. H. F. L.

LAW SOCIETY.

HILARY TERM, 1885.

The following is the resumé of the proceedings of the Benchers published by authority. The following gentlemen were called to the Bar, namely:

Messrs. Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry Hubbs, Harry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurchy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Foster Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, Edward Allen Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manley Germon, George McLaurin.

The following gentlemen obtained certificates of fitness, namely:

Messrs. A. G. Murray, H. B. Elliott, A. E. Overell, H. J. Wickham, J. Greer, W. C. Widdifield, F. R. Powell, J. Heighington, N. N. A. McMurchy, A. Stuart, A. S. Lown, F. H. Phippen, J. Denovan, E. A. Miller, G. C. Thompson, R. H. Hubbs, W. A. Matheson, Joseph Campbell, T. Moffat, H. L. Ingles, James Miller, J. W. Berryman, F. E. Nelles, George Green.

The following passed their First Intermediate Examination, namely:

Messrs. Weekes, Sinclair, McPherson, Kerr, Millican, Hood, Lahey, McCabe, Fletcher, Guthrie, Quinn, Hutcheson, Jack, Watts, Murdoch, Thomson, Warner, Carson, Wallbridge, Dawson, Greene, Wardell, Fitch, Bowes, Chapple, Sinclair, Skinner. Messrs. Weekes, Kerr and Sinclair passed with honors, and were awarded the first, second and third scholarships.

The following gentlemen passed their Second Intermediate Examination, namely:

Messrs. Raney, Bristol, Cunningham, Marquis, Hays, Campbell, Harrington, Carson, Lewis, Macbeth, Treemean, Jackson, Hobson, Smith, Lindsay, Mowat, Coughlin, Stone, Wismer, Vanstone, Bucke, Lafferty, McTavish, Dawson, Gunn, McCarron, Yarwood. Messrs. Raney and Bristol passed with honors, and were awarded the first and second scholarships respectively.

The following gentlemen were admitted into the Society as students-at-law, namely:

Graduates—John Henry Cosgrove, Alexander Henderson, Jr.; John Arthur Tanner, Francis Alexander Anglin.

Matriculants of Universities—Alfred E. Cole, Dioscore J. Hurteau, William Charles Mikel.

Juniors—W. H. Moor, G. W. Littlejohn, A. St. G. Ellis, G. McCarter, W. A. Smith, E. N. R. Burns, E. S. Brown, J. P. O'Gara and W. Walton passed the Articled Clerks Examination.

MONDAY, 2ND FEBRUARY, 1884.

Present—Messrs. Meredith, Moss, J. F. Smith, Hoskin, Morris, Irving, Murray, McKelcan, Read, MacLennan, McCarthy, Ferguson.

In the absence of the Treasurer Mr. Irving was elected Chairman.

The various reports of the Examiners and Secretary in relation to the several

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examinations were read and considered, and the names of the successful candidates announced. A letter from Mr. H. J. Scott was read complaining of an over-charge for a copy of a judgment.

Ordered, That it be referred to the Reporting Committee to enquire into and report to Convocation.

TUESDAY, 3RD FEBRUARY, 1885.

Present—Messrs. Moss, Murray, Meredith, Kerr, Morris, MacLennan, Irving, Britton, Ferguson, J. F. Smith, Foy and McMichael.

On motion of Mr. Meredith, seconded by Mr. Moss, Mr. Irving was elected Chairman in the absence of the Treasurer.

On motion of Mr. Moss, seconded by Mr. Kerr, Mr. B. B. Osler was elected a Benchman in the place of James Bethune, Esq., Q.C., deceased.

The report of the Legal Education Committee on the subject of the call of English barristers to the Ontario Bar was directed to be considered on Saturday, 7th instant.

Mr. Moss moved the following rule, seconded by Mr. Morris, That rule No. 23 be amended by striking out the word "six" in the first line thereof, and substituting the word "four" in lieu thereof. The rule was read a first, second and third time and carried.

Mr. Moss moved that the following rule be read a first time. Mr. Morris seconded the motion which was carried. The rule was read a first time as follows: That rule 50 be amended by striking out the word "six" in the last line thereof, and substituting the word "seven" in lieu thereof. The rule was read a second and third time and carried.

The Secretary laid on the table the estimates prepared by the Finance Committee for the year 1885 and the balance sheet for the year 1884. The estimates and balance sheet were read. (See schedules at end of resumé.)

Ordered, That the balance sheet be printed and distributed according to the statute.

SATURDAY, 7TH FEBRUARY, 1885.

Convocation met. Present—Messrs. McCarthy, Read, Ferguson, Osler, Morris, Martin, McMichael, J. F. Smith, McKelcan, Moss, Murray and MacLennan.

On motion of Mr. Read, seconded by Mr. Ferguson, Mr. Irving was elected Chairman in the absence of the Treasurer.

Mr. Read moved that Mr. Osler be placed on the Reporting Committee, and that Mr. Morris be placed on the Library Committee. Carried.

The petition of the Middlesex Law Association was referred to the County Library Aid Committee.

The report of the Legal Education Committee on the question of Call to the Bar of this Province of English, Scotch and Irish barristers was considered, and the fourth clause thereof was, on motion, expunged, and the report, as amended, was adopted.

Mr. Ferguson moved, seconded by Mr. McKelcan, That the Secretary be instructed to inform Mr. De Souza that his petition is not in order, and cannot be dealt with until after the Petitioner shall have complied with the rules of the Society as to notice, &c. Carried.

Mr. F. McKelcan gave notice that he would move, at the next regular meeting of Convocation, to introduce a rule amending the rules for Call in special cases by re-enacting the rules and regulations relating to the Call of Barristers in special cases as they existed prior to the 2nd September, 1882, and also to make further provisions for Call in special cases.

FRIDAY, 13TH FEBRUARY, 1885.

Present,—Messrs. Moss, Morris, Murray, Meredith, Bell, McCarthy, Beatty, Hoskin, Britton, MacLennan, McKelcan, Irving, Kerr, J. F. Smith, Read, Hudspeth, McMichael.

Mr. Irving was elected Chairman in the absence of the Treasurer.

The report of the Legal Education Committee on the petition of Mr. Green, an English solicitor of eighteen years' standing, recommending that he receive his certificate of fitness on payment of the fees in special cases, was received, read, considered and adopted. Ordered accordingly.

The report of the Committee on Legal Education, on the petition of Mr. Masson, was received and read.

Ordered, That the report be referred back to the Committee, with instructions to report that Mr. Masson should be admit-

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ted to an oral examination, on the ground that he had obtained not less than fifty per cent. of the aggregate of the marks in all the subjects.

The report of the same Committee on the petition of Mr. Strange was received and read and adopted. Ordered that Mr. Strange be called to the Bar.

On the motion of Mr. Meredith, seconded by Mr. Hoskin, it was ordered that the Legal Education Committee be directed to take such steps as may be necessary to get legislation in regard to the admission of English barristers.

Mr. McKelcan moved, seconded by Mr. Beatty, that rule 94 be amended by inserting as a second sub-section thereof the clause following:—

2. Any person who has been duly called to the Bar by any of the Inns of Court or Societies having authority to call to the Bar of any of the Superior Courts of England, Ireland or Scotland.

That sub-section 3 of rule 95 be and the same is hereby re-enacted in the same terms as it stood in the rules of the Society prior to the 2nd September, 1882.

The amendment hereby enacted shall not apply to any one who shall have given notice during the present term of his intention to apply for call to the Bar.

The rule was read a first time.

On the motion of Mr. McKelcan, seconded by Mr. Britton, it was ordered that the above resolutions be referred to the Legal Education Committee for consideration, the Committee to report to Convocation next term.

Ordered, That the Solicitor of the Society be directed to instruct Mr. Robinson, Q.C., the Counsel retained, to oppose any claim of Mr. De Souza to practise at the Bar, without being first called to the Bar by the Law Society.

The report of the Finance Committee on the proposed investment of \$5,000 was received and read.

Ordered, That the proposal of the Committee to invest \$5,000 in the Huron and Erie Loan and Investment Company at five per cent., with a commission of one per cent., be approved.

Mr. Britton gave notice that he would on the first Tuesday of next term move that the question of having a telephone upstairs, at Osgoode Hall, be referred to a committee, with power to have one so placed.

The Secretary's letter to the Commissioners of Public Works was read, and no reply having been received, the Finance Committee was directed to take such action as may be necessary to have the repairs done by the Government.

The Solicitor's report was read, and the attention of the Finance Committee was directed to the unsatisfactory position of the matter of the boundaries mentioned in the said report.

Convocation adjourned.

ESTIMATES FOR 1884.

Estimated Receipts.

Certificate and term fees	\$17300 00
Notice fees	625 00
Attorney's examination fees	5500 00
Students' admission fees	6750 00
Call fees	8500 00
Interest and dividends	2500 00
Government payment for heating, light, and water	2000 00
<i>Sundries—</i>	
Fees on petitions, diplomas and certificates of admission	150 00
Commission and fees on telegraph and telephone	275 00
Reports sold, including Digest	950 00
	<u>\$44550 00</u>

RECEIPTS FOR 1884.

Actual Receipts.

Certificates and term fees....	\$18253 75
Less fees returned	41 50
	<u>\$18212 25</u>
Notice fees	674 00
Attorney's examination fees..	\$7442 83
Less fees returned	1115 00
	<u>6327 83</u>
Students' admission fees	\$6520 00
Less fees returned	400 00
	<u>6120 00</u>
Call fees.....	\$11629 75
Less fees returned	3119 75
	<u>8510 00</u>
Interests and Dividends.....	2821 05
Government payment for heating, lighting, and water....	2000 00
Fees on petitions, diplomas and certificates of admission	125 00
	<u>\$44790 13</u>

EXPENDITURE FOR 1884.

Actual Expenditure.

<i>Reporting—</i>	
Salaries.....	\$8924 20
Postage	135 00
Printing	7698 98
Supreme Court Reports ..	1848 00
Notes for <i>Law Journal</i>	395 49
New Digest	2684 75
	<u>\$21686 42</u>
Less reports sold.....	642 47
	<u>\$21043 95</u>

LAW SOCIETY.

Examinations—

Salaries	\$3200 00
Scholarships	1380 00
Printing and stationery....	347 40
Prizes in books (law school)	50 00
Engrossing fee returned ..	2 00
Examiners for matriculation	195 00
Medals	177 87

5352 27

Library—

Books, binding and repairs	3217 29
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General Expenses and Salaries—

Secretary, Sub-treasurer and librarian	\$2000 00
Assistants	1113 11
Housekeeper	360 00

3473 11

Lighting, Heating, Water and Insurance—

Engineer and assistant....	\$510 00
Gas	475 53
Water	631 73
Insurance (books)	90 00
Bennett & Wright, new apparatus	500 00
Fuel	264 32
Repairs to apparatus.....	182 30
Carting coal and cutting wood	42 40

2696 28

Grounds—

Gardener and assistant	\$340 00
Tools	3 30
Manure	22 50
Labour	396 46
Snow clearing	101 64

863 90

Sundries—

Postage	\$31 60
Advertising (including <i>Law Journal</i> account)	115 85
Stationery, printing, etc....	172 39
Law costs	752 83
Repairs	180 35
Furniture	449 77
Term lunches	725 82
County library aid	900 00
Telephone office	273 98
Portrait (Berthon)	400 00
Auditor (\$100 01), Ellis (clocks, \$10)	110 01
Tennant (\$56 34), Telegrams (\$5 90)	62 24
Clarkson (\$12 60), Gilly (\$10)	22 60
Resumé	43 00
Blinds (\$4 11), Hay & Co. (\$12 90)	17 06
Illuminating address (Spragge)	15 00
Ice (two years, \$25), papering (\$29 68)	54 68
Door springs (\$7 50), J. Daley (\$9 30)	16 80
Oiling and cleaning	27 15
Guarantee Company	20 00
Dusting books	16 95
W. Hope	20 00

Telephone assistant	9 00
Parkes	6 90
Petty charges	28 25

4472 23

3671 10

Balance

\$44790 13

ESTIMATE FOR 1884.**Estimated Expenditure.****Reporting—**

Salaries	\$8600 00
Postage	105 00
Printing	7850 00
Supreme Court Reports ..	1800 00
Notes for <i>Law Journal</i>	90 00
New Digest, compiling (\$1000), printing (\$1400), distributing (\$100)	2500 00
Insurance	100 00

\$21045 00

Examinations—

Salaries	\$3200 00
Scholarships	1600 00
Printing and stationery....	250 00
Medals	120 00
Law school prizes	50 00
Examiners for matriculation	300 00
<i>Law Journal</i> account	100 00

5620 00

Library—

Books, binding and repairs.	2300 00
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General Expenses and Salaries—

Secretary, Sub-treasurer and librarian	\$2000 00
Assistants	1200 00
Housekeeper	360 00

3560 00

Lighting, Heating, Water and Insurance—

Engineer and assistant	\$425 00
Gas	630 00
Water	843 00
Weighing coal	5 00
Fuel	853 00
Repairs to apparatus.....	300 00
Carting coal and cutting wood	75 00

3131 00

Grounds—

Gardener and assistant	\$500 00
Tools	5 00
Cartage	60 00
Water for lawn	34 00
Snow clearing	40 00

639 00

Sundries—

Gas for cook stove.....	\$50 00
Auditor	100 00
Postage	30 00
Telephone rent	100 00
Clocks	10 00
Ice	15 00
Term lunches	400 00
Cleaning windows	34 00
Guarantee Company	20 00
Dusting books	18 00
P. O. box	6 00

LAW SOCIETY—CANADA CENTRAL RAILWAY CO. v. PETER McLAREN.

Telephone operator.....	432 00
" boy	96 00
" messages	8 00
Resumé	40 00
Repairs to furniture	50 00
New furniture	300 00
Repairs to walks.....	300 00
Law costs	1000 00
Removing matting	40 00
Unforeseen expenses.....	200 00
Stationery	240 00
	<hr/>
	3489 00

Extraordinary Expenditure—

Furnace for east wing	400 00
County library aid.....	1616 00
Balance.....	2250 00
	<hr/>
	\$44550 00

ESTIMATES FOR 1885.

Receipts.

Certificate and term fees	\$18250 00
Notice fees	630 00
Attorney's examination fees.....	5750 00
Students' admission fees	6000 00
Call fees	8250 00
Interest and dividends	2900 00

Sundries—

Fees for petitions, certificates and diplomas.....	120 00
Commission and fees on telegraph and telephone	275 00
Reports sold	1150 00
Digests sold	1400 00
	<hr/>
	\$44725 00

*Expenditure.**Reporting—*

Salaries	\$8600 00
Printing	9950 00
Half probable expense of election reports	85000
Notes for <i>Law Journal</i> and <i>Law Times</i>	500 00
Insurance on stock of reports	90 00

Examinations—

Salaries	3200 00
Scholarships	1500 00
Printing and stationery.....	250 00
Medals	120 00
Law school prizes	50 00
Examiners for matriculation	200 00
<i>Law Journal</i> account.....	100 00

Library—

Books, binding and repairs	3000 00
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General Expenses and Salaries—

Secretary, Sub-treasurer and librarian.....	2000 00
Assistants	1200 00
Housekeeper	360 00

Lighting, Heating, Water and Insurance—

Gas for cookstove	70 00
" building	220 00
Water for building (\$120), for grounds (\$34)	154 00
Insurance premium for three years ..	595 00
Payment to Government under contract ..	750 00
Fuel, coal (\$150), wood (\$50)	200 00
New apparatus, balance due.....	370 00

Grounds—

Man (\$360), hose for lawn and reel (\$60) ..	420 00
Expense of grounds as per contract ..	250 00
Repairing boardwalks	50 00
Snow clearing	50 00

Sundries—

Flowers.....	25 00
Postage (\$30), Resumé in <i>Law Journal</i> (\$40)	70 00
Stationery (\$200), law costs (\$500)....	700 00
Repairs to building, including fitting up new rooms in basement	250 00
Term lunches ..	500 00
Furniture, including new lockers and cupboards.....	300 00
County library aid (annual).....	1300 00
Supplementary initiatory.....	2350 00
Guarantee Company premium	20 00
Telegraph operator.....	432 00
" relief operator	20 00
" message boy.....	96 00
Telephone rent	100 00
New clocks	30 00
Attendance on clocks.....	10 00
Portrait frame (C. J. Cameron)	114 00
Dusting books.....	18 00
Oiling floor of library	16 00
100 copies Resumé (four terms)	12 00
Auditor	100 00
Ice	15 00
Unforeseen expenses	200 00
Knife cleaner and carpet sweeper	21 00
Engrossment of resolution (late J. Bethune, Q.C.)	15 00
	<hr/>
	\$41813 00

Estimated balance

2912 00

\$44725 00

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CANADA CENTRAL RAILWAY CO. v. PETER McLAREN.

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REPORTS.

ENGLAND.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

CANADA CENTRAL RAILWAY COMPANY
(Appellants), v. PETER McLAREN
(Respondent).*Negligence—Contributory negligence—Evidence.*

[July 12, 1884.]

This was an appeal from the Court of Appeal of Ontario, reported in 8 App. Rep. 564, and was heard before Lord Watson, Sir Barnes Peacock, Sir Robert P. Collier, Sir Richard Couch and Sir Arthur Hobhouse.

Bethune, Q.C., for appellant.

McCarthy, Q.C., for respondent.

The following is the judgment of the Court:—

The appellants are the proprietors of a railway which passes through the village of Carlton Place, in the Province of Ontario, situated on the north bank of the River Mississippi. The respondent is a timber merchant, and in the course of his business he brings large quantities of wood, in rafts, to Carlton Place, which are there converted into sawn lumber, and, when thoroughly dried, are sent to market along the appellants' railway. For many years prior to the origin of the present litigation, the respondent had, with the leave of the appellants, been in use to pile his sawn lumber on the appellants' land, with a view to its being conveniently loaded or "shipped" in railway cars, for conveyance to market. The piles, which were stacked on both sides of the line, were seventeen or eighteen feet in height, from a foot to a foot and a half apart, and the face of each pile was not more than six feet distant from the nearest rail used for the appellants' ordinary traffic.

On the 27th May, 1879, a fire broke out in one of the piles on the east side of the appellants' main line, and, spreading rapidly, destroyed a great quantity of lumber and plant belonging to the respondent. On the 3rd October, 1879, the respondent instituted an action against the appellants, for recovery of the damages thus sustained by him, upon the allegation that the fire had been caused by the escape of sparks, or burning matter, from one of the appellants' locomotives, in consequence either of its having been negligently and unskillfully managed, or of its having been insufficiently and improperly constructed.

The case was first tried before a special jury in January, 1880, when the jury brought in certain findings in the respondent's favour, which were subsequently set aside by the Court, as being against the weight of evidence.

The second trial took place in January, 1882, before Mr. Justice Osler and a special jury. The respondent's evidence was mainly directed to these points: (1) that the ash-pan of the appellants' locomotive engine No. 5, which admittedly passed the pile in which the fire began shortly before it was observed, was not properly constructed; (2) that the chimney or smoke-stack of the engine was defective in construction; and (3) that, owing to one or other of these defects, a live ember escaped, which ignited the pile in question, and so caused the destruction of the respondent's property. The appellants adduced evidence to meet the case set up by the respondent, and also to prove that the respondent had been guilty of contributory fault, inasmuch as he had suffered sawdust or similar inflammable material to adhere to the piles of lumber, and had failed in other respects to take sufficient precautions against fire.

At the close of the trial the presiding Judge put fifteen questions to the jury. Of these it is only necessary to notice the following, with the answers returned:—

First. How did the fire occur; from sparks or cinders cast out by the locomotive, or from some other cause?

Answer. We think the fire occurred from sparks cast by the locomotive.

Second. If you find that the fire was caused by fire cast out by the locomotive, did it come from the smoke-stack or the ash-pan?

Answer. From the smoke-stack.

Third. If you find that it came from the smoke-stack, was it from any imperfection in the construction of the stack, or from the way in which it was managed by those in charge of the train?

Answer. Imperfection of the stack.

Fourth. If you find that it was from any imperfection in the construction, state what the imperfection was; was the netting too large, the open or unfastened bonnet improper, or was the cone too close to the netting?

Answer. Cone too close to the netting.

Fifth. Was the bonnet rim fitted to the bed?

Answer. We think not so completely as it should have been.

Tenth. Would there be more substantial danger of fire from the bonnet provided with the mesh of the size of that used by the defendants (appellants), than from that used by the Northern Railway, which appears to be the smallest in use?

Answer. Yes.

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Eleventh. Were the defendants (appellants), in your opinion, guilty of negligence in using such a mesh?

Answer. No.

Twelfth. Was the plaintiff (respondent) guilty of contributory negligence in piling his lumber so near the track, or by allowing sawdust to remain on it, or by not having sufficient appliances to extinguish fire. If the plaintiff (respondent) was guilty of negligence, could the defendants (appellants), by the use of ordinary care and diligence, have prevented the injury?

Answer. Not as to piling lumber, or as to sawdust, but somewhat so as to appliances. We think that defendants (appellants) could have prevented the fire, and that the plaintiff (respondent) is entitled to a verdict.

Questions 6, 7, 8 and 9 related to the management of the smoke-stack and ash-pan, and the possibility of the fire being caused by the ash-pan; and these, for obvious reasons, were not answered by the jury. Questions 13, 14 and 15 related solely to the amount of damages; and the answers to these are not impeached by the appellants.

Upon the foregoing findings Mr. Justice Osler directed judgment to be entered for the respondent for 100,000 dollars, the sum at which damages were assessed by the jury, with costs. The appellants, on the 14th February, 1882, obtained an order *nisi* to set aside that judgment and to enter judgment for themselves, or to allow a new trial, on these grounds:—(1) that the findings in question did not warrant a judgment in favour of the respondent, and that judgment ought to be entered for the appellants; (2) that there was no evidence to go to the jury in support of the main findings, or, at all events, that the evidence was altogether insufficient to support them; and (3) that certain evidence adduced for the respondent had been wrongly admitted, whilst evidence tendered by the appellants had been unduly rejected.

On the 10th March, 1883, the order *nisi* was discharged, with costs, by the unanimous decision of the Common Pleas Division of the High Court of Justice of Ontario, the bench consisting of Chief Justice Wilson, Mr. Justice Galt and Mr. Justice Osler, before whom the case had been tried. The cause was then carried, by the present appellants, to the Court of Appeal for Ontario. The learned Judges composing that Court were equally divided; Chief Justices Spragge and Hagarty being of opinion that the decision of the Court of Common Pleas was right, whilst Justices Burton and Patterson were in favour of allowing the appeal. In these circumstances, the appeal was, on the 6th October, 1883, dismissed with costs.

The present appeal has been taken against the judgments of the Court of Common Pleas and of the Court of Appeal of Ontario, discharging the order *nisi* obtained by the appellants on the 13th February, 1882; and all the points raised by the order *nisi* were fully argued by the appellants' Counsel, with the single exception of the alleged undue rejection, by the presiding Judge, of evidence tendered at the trial on behalf of the appellants.

Their Lordships entertain no doubt that, taking the findings of the jury as they stand, the facts thereby found necessarily lead to judgment in favour of the respondent. Shortly stated, the substance of these findings is: that the destruction of the respondent's piles of lumber was caused by fire escaping from the smoke-stack of a locomotive engine belonging to the appellants; that the escape of the fire was owing to the defective construction of the smoke-stack, its defects consisting in the cone being placed too close to the netting, and in the bonnet rim not being so well fitted to its bed as it ought to have been; and that, by the use of ordinary care and diligence, the appellants could have prevented the fire. Assuming the facts to be as thus found, their Lordships are unable to understand on what ground the appellants can be relieved of responsibility for damages directly occasioned by their using a defectively constructed locomotive—damages which would not have occurred but for their failure to exercise ordinary care and diligence.

Upon this part of the case their Lordships listened to a great deal of argument and minute verbal criticism of the findings of the jury, which had really very little bearing upon the question before them. In impeaching the judgment based upon these findings the appellants cannot travel beyond the reasons assigned by them in the order *nisi*; and the only ground there stated for setting aside the judgment of Mr. Justice Osler, and entering judgment for the appellants, is that "it is not found as a fact that the fire came from the defendants' (appellants') locomotives, but is at most only a matter of conjecture." Their Lordships can understand an argument to the effect that the jury must have based their findings as to the source of the fire on conjecture, but the proposition, as stated, has obviously no foundation in fact. The jury in response to the question, "How did the fire occur?" said, "We think the fire occurred from sparks cast by the locomotive." And in response to the further questions, "Did it (i.e., the fire) come from the smoke-stack or the ash-pan?" affirmed, in express terms, that it came "from the smoke-stack."

The appellants' next contention was that the

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findings ought to be set aside, and judgment entered for them, in respect there was no evidence to go to the jury in support of the respondent's allegations, and of the findings of the jury, to the effect that the fire which ignited the lumber came from the appellants' locomotive, or that the appellants negligently used an imperfectly constructed locomotive. It is sufficient to say that the argument for the appellants upon another branch of the case, which involved an examination of the statements made by the leading witnesses, satisfied their Lordships that there was evidence upon both these points well fitted for the consideration of the jury, and that the presiding Judge would have committed a grave error if he had given effect to the motion made by the appellants' Counsel in the course of the trial, and directed a nonsuit.

It may be proper to advert here to a proposition which was submitted, though not very strongly pressed, by the appellant's Counsel. It is thus stated in the order *nisi*, as a ground for setting aside the findings, and entering judgment for the appellants,—“ that the plaintiff (respondent), by piling his lumber in the defendants' (appellants') property took upon himself the risk of the same being consumed by fire from such locomotives as the defendants (appellants) used.” These words are deficient in legal precision. They might very well signify that the respondent took upon himself the risk of fire which might be attendant upon the careful management of such locomotives as the respondents generally use; and in that sense the proposition which they involve would hardly be disputed by the respondent, but it would not assist the appellants' case. Accordingly a much wider meaning was attributed to the words in the course of the argument, which really came to this—that the respondent must be held to have assumed all risks of fire arising from negligence on the part of the appellants' servants, and from the disrepair or defective construction of their engines. When thus explained, the proposition appears to be so opposed to reason and authority that their Lordships do not think it necessary to take any farther notice of it.

In the next place, it was maintained for the appellants, that the answers of the jury to the first, second, third, fourth and tenth questions were against evidence; and that the findings in answer to the question numbered the *fifth* ought to be set aside, not only because it was against evidence, but also in respect that the question was irregularly submitted to the jury. The alleged irregularity consisted in this, that the presiding Judge, after receiving replies to the other questions, and after the respondents' Counsel had moved for judg-

ment, put that additional question to the jury, before they were discharged, with the view of explaining the answer which they had already given to the fourth question. It appears to their Lordships that, in so doing, the presiding Judge acted within his powers, and with perfect propriety. It was the duty of the learned Judge to prevent miscarriage, and to take care that the material issues of fact raised by the evidence should be exhausted; and in the event of any answer given by the jury being incomplete, or requiring explanation, it was his duty, as well as his right, to put a farther question or questions, with the view of ascertaining what the jury did intend to find as their verdict.

Upon the question whether the findings complained of in the order *nisi* are against evidence, their Lordships, after hearing Counsel for the appellants, are not prepared to differ from the judgments of the Courts below. It is for the appellants to show that an honest and intelligent jury could not reasonably derive from the evidence the conclusions which the jury who tried this case have embodied in their findings. That, in the present case, implies a very heavy *onus*. Seeing that there must, some time or another, be an end of litigation, Courts are naturally reluctant to allow a third trial by jury except upon clear and strong grounds; and in this case the verdict of the jury has been sustained by the concurrent opinions of no less than five of the seven learned Judges who heard and decided the case in the Courts below, one of the five being the Judge who presided at the trial.

Apart from these considerations, which are of great importance in determining whether a new trial ought to be allowed, their Lordships have formed the opinion for themselves, that there is evidence sufficient to sustain the material findings of the jury. The appellants' Counsel scarcely ventured to dispute that the evidence was sufficient to warrant the finding that the fire which caused the mischief came from the smoke-stack of the locomotive engine No 5. Then it seems to be sufficiently established by the evidence that,—if the lower edge of the cone be one or two inches above the level of the bed on which the rim of the bonnet rests, and if at the same time there be an aperture between the bed and the rim, caused either by the rim not being evenly fitted to the bed, or by the rim not being tightly fastened down—it is not only possible, but probable, that the exhaust steam from the cylinders will be deflected by the cone, and rush through that aperture, carrying with it sparks or live embers of a larger size, and therefore more likely to cause

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a conflagration, than those which escape through the mesh of the bonnet. It is proved beyond doubt that, on the 27th May, 1879, the cone of the locomotive No. 5 was so constructed that its lower edge was two inches above the level of the bed upon which the bonnet rim was rested. Accordingly, in the course of the appellants' argument upon this point, the real and the only question came to be, whether there was evidence to show that, on the 27th May, 1879, the connections between the bonnet rim of No. 5 engine and its bed were so defective as to admit of fire escaping through some space between them. In the opinion of their Lordships there is evidence from which the jury might fairly draw the conclusion that fire did escape in that way, and did ignite the respondent's lumber. Their Lordships do not, however, consider it necessary to enter into a detailed explanation of their reasons for holding that opinion, it being quite sufficient for the disposal of this part of the case that the appellants have utterly failed to satisfy their Lordships either that the Judge should have withheld the case from the jury for lack of evidence, or that the findings were either perverse or unreasonable.

There still remain for consideration the objections taken by the appellants to the administration of evidence for the respondent, and in particular to the admission in evidence of the entry made by Burns, the driver of No. 5 engine, in the report book kept at the defendants' workshops at Brockville, on the 30th May, 1879, three days after the fire. The entry admittedly related to engine No. 5, and it contains *inter alia* this sentence: "Bottom rim of bonnet in stack wants making tight." It appears to their Lordships that an entry in these terms, applicable to the locomotive which was alleged to have caused the fire, could not, in the circumstances of this case, be regarded as immaterial evidence; and, in that view, the question whether it was wrongly admitted becomes of importance. The appellants objected to its admissibility on these grounds: (1) that evidence of the state of the engine on the 30th May could not be competently admitted as tending to show what was its condition on the 27th May; (2) that Burns could not on the 30th May bind the company by any admission, direct or indirect, as to the condition of the engine on the 27th May; and (3) that the entry was objectionable, because it went to contradict statements made by Burns, as a witness, with regard to the state of the engine on the 30th May, and that it was not tendered or admitted in terms of section 27 of the Revised Statutes of Ontario, cap. 62. As to the first of these objections, their Lordships are of opinion

that it was competent for the respondent to give evidence as to the condition of the engine on the 30th May, as throwing light upon any structural defects arising from imperfect design, or from disrepair, which might have existed on the 27th May, it being open to the appellants to prove that any defects, appearing at the later of these dates, were due to intermediate causes. Their Lordships are also of opinion that the entry was not tendered or received as an admission by the company in regard to the condition of the smoke-stack on the 27th May.

What the respondent was endeavouring to prove, when the entry was put in evidence, was the condition of the smoke-stack of locomotive No. 5 at the time when it was taken into the appellants' workshops for repair, on the 30th May. It has been proved that it was the duty of Burns to take his engine to the workshop for repairs, and that it was his duty to enter in a book, kept there for the purpose, the repairs needed, for the information and guidance of the workmen. Had he given verbal instructions to the workmen, it would have been clearly competent to ask him what the instructions were. He was the agent of the appellants in giving such instructions, which were part of the *res gestæ* of the 30th May, and the appellants could not have objected to his telling the jury what instruction he did give, on the ground that these were inconsistent with something which he had already deposed to. There is no difference in principle between asking the witness to state the verbal instructions which he gave, and putting his written instructions in his hand and asking him to read them. Such an entry as that in question, when it is so put in evidence, cannot be regarded as a mere statement or narrative of fact; it was an instruction given, an act done, by Burns, in the ordinary course of his employment as an engine-driver of the appellant company. Their Lordships are accordingly of opinion that the entry was legitimately used as evidence at the trial, and they concur in the observations which were made upon this point by Chief Justice Hagarty in the Court of Appeal.

The only objection remaining to be noticed is that which was taken by the appellants to the admission of evidence that the locomotive No. 5 was in use to throw fire. The argument addressed to their Lordships, in support of this objection, really went to the value, and not to the admissibility of the evidence; and their Lordships have no hesitation in holding that the objection is not well founded. The admissibility of evidence depends upon its character, and not upon its weight; and their Lordships cannot doubt that

RECENT ENGLISH PRACTICE CASES.

evidence tending to show that engine No. 5 habitually threw more fire than the other locomotives used on the appellants' railway might be legitimately taken into account by the jury in considering whether it was defective in construction.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal ought to be dismissed. The appellants must bear the costs of the appeal.

RECENT ENGLISH PRACTICE CASES.

DAVID V. HOWE.

Transfer of action to County Court—Plaintiff failing to proceed—Jurisdiction of Superior Court.

[L. R. 27 Ch. Div. 533.]

When an order has been made for the transfer of a Chancery action to a County Court under sect. 8 of the County Courts Act, 1867 (cf. R. S. O. c. 50, s. 31) the Superior Court retains its jurisdiction in the action until the transfer has been completed by all necessary steps being taken for that purpose.

Hence, if after such transfer the plaintiff fails to enter action for trial at the County Court, the plaintiff may move before the Superior Court to dismiss it for want of prosecution.

EMENY V. SANDES.

Action remitted for trial to the County Court—Costs.

[L. R. 14 Q. B. D. 6.]

Where an action in the Supreme Court has been ordered to be tried in a County Court, and has been so tried, the High Court retains its power under Order 75, r. 1, 1883 (O. J. A. rule 428) of dealing with the costs of the action.

BRADFORD V. YOUNG.

IN RE FALCONAR'S TRUSTS.

Stay of proceedings pending appeal—Payment out of Fund in Court.

[28 Ch. Div. 18.]

In the absence of special circumstances it is not the practice of the Court to retain in Court pending an appeal, a fund which has been ordered to be paid out, because there is an appeal from the order.

An order directing the payment of a fund out of Court, consisting of money on deposit and East India stock, to the plaintiff having been made just before the commencement of the long vacation,

and an appeal having been presented, a suspension of the payment out was granted over the Long Vacation in order to enable the appellant to apply to the Court of Appeal.

Wilson v. Church, 12 C. D. 454, and *Walburn v. Ingilby*, 1 My. & K. 70 considered.

The application being renewed before the Court of Appeal, at the close of the Long Vacation, and it being shown that the plaintiff had been abroad for two years, and that the applicant could not discover his address, it was held that payment out ought to be stayed if the applicant would give security to pay to the plaintiff interest at £4 per cent. on the present value of the funds in Court, and to make good to the plaintiff, if the appeal was unsuccessful, the difference between the highest market price of the investments at any time before the hearing of the appeal and their market price on the day of the hearing of the appeal.

ADAM, SON & CO. V. W. TOWNEND & CO.

Imp. O. 12, r. 15—O. J. A. r. 57.

Service of a writ on one member of a trading partnership—Appearance by him only "as a partner of the firm."

A writ was issued against a trading partnership (unincorporated), and served upon a member of the firm, who entered an appearance, "W. N. a partner of the firm of W. T. & Co." There was no service upon or appearance by the other members of the firm.

Held, that leave to sign judgment against the firm for default of appearance could not be granted.

Jackson v. Litchfield & Son, 8 Q. B. D. 474 followed.

[L. R. 14 Q. B. D. 103.]

MATHEW, J. You cannot have judgment against the partner who has appeared, which is in effect what you are asking for; nor can you have judgment against the firm including N. Your proper course would seem to have been to apply to strike out the appearance by him; this you have not done.

THE BEESWING.

Appeal—Cross appeal—Withdrawal of appeal.

[L. R. 10 P. D. 18.]

When a respondent has given notice that he will, on the hearing of an appeal, contend that the decision of the Court below should be varied, and the appellant subsequently withdraws his appeal, such notice entitles the respondent to elect whether to continue or withdraw his cross-appeal. If he continues his cross-appeal the appellant has the right to give a cross-notice that he will bring forward his original contention on the hearing of the respondent's appeal.

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[Chan. Div.]

NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**CHANCERY DIVISION.**

Proudfoot, J.]

[February 3.]

HUGHES v. REES.*Res judicata—Estoppel—Necessity of pleading—
No opportunity of pleading—Amendment at
hearing—Master's office—O. J. A., r. 178, 184.*

Appeal from the Master's Report made in accordance with his judgment reported 10 P. R. 301, and *supra*, vol. 20, p. 343, and pursuant to the reference ordered in this case which will be found reported 5 O. R. 654.

The defendant, D. J. Rees, now appealed from the report because the Master refused to conclude the plaintiff by the judgment in the Superior Court of Lower Canada, as it had not been pleaded, and had held that it was not open under the terms of the reference,

Held, that the defendant, D. J. Rees, had had no opportunity of pleading the judgment of the Lower Canadian Court; and might, therefore, produce it before the Master as conclusive evidence in his favour.

Although a judgment of a Court of competent jurisdiction directly on the point is, as a plea, a bar; and, as evidence, is conclusive between the same parties upon the same matter directly in question in another Court, yet to have this effect it must be pleaded *when there is an opportunity of pleading it*. But here the amendment made by the plaintiff was made on a motion subsequent to the hearing; but before the decree was drawn up under O. J. A., r. 178 and 184, and the order giving leave to amend was contained in the decree, which orders that upon the plaintiff amending his bill as he might be advised, it was referred to the Master to inquire if the plaintiff had any valid claim for maintenance, and if he had to take the account; but there was no provision for allowing the defendant to answer or set up a new defence, and from the order being for an immediate reference upon the amendment being made, it would appear that

the learned Judge did not contemplate any answer being put in.

The Master certified that the defendant, D. J. Rees, also proved before him a judgment in the Superior Court of Lower Canada, dated Dec. 13, 1879, in an action by his wife against him for alimony, decreeing a certain sum to be paid by him to his wife as alimony from a certain date.

Held, this judgment must be deemed to put an end to any implied liability on the part of the husband to pay for the wife's maintenance subsequently to the date from which alimony was to be paid under it.

J. MacLennan. Q.C., and R. E. Kingsford for the appellant.

S. H. Blake Q.C., and G. Morphy contra.

Ferguson, J.]

[February 17.]

MACDONALD v. MCCOLL.*Creditors' suit—Chattel mortgage void against
creditors—Simple contract creditors—Suit on
behalf of all creditors except the preferred ones—
Locus standi.*

Action brought by simple contract creditors on behalf of themselves and all other creditors of C., other than the defendants, McColl & Co., to have a certain chattel mortgage made by C. to McC. & Co. set aside and cancelled as in fraud of creditors.

It appeared that the chattel mortgage was given by C. when in insolvent circumstances, because McC. & Co., knowing his circumstances, told him that if he gave it it would protect him against all his creditors but themselves, and that they would protect him. It also appeared that McC. & Co. told C. that there was no intention on their part to enforce the mortgage, unless other creditors took proceedings against him. C. did not give the chattel mortgage in answer to a demand on the part of McC. & Co., but because of their representations as above mentioned. Hence it appeared that a compact was entered into between McC. & Co. and C., the intent of which was to ward off, to hinder, and delay the other creditors, and to prefer McC. & Co. to them, and that the mortgage in question was made with this intent on the part of both parties to it; and that though the proposals that the

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mortgage should be given came from McC. & Co., there was no pressure that induced the giving of the security—there was not a simple yielding to the proposal or importunity of the creditor.

Held, therefore, the plaintiffs were entitled to judgment.

Held, also, that the fact that the plaintiffs excluded McC. & Co. from the creditors on whose behalf they were suing was not a valid objection to the suit.

Held, further, that the fact that the plaintiffs were simple contract creditors only, and that the mortgagor had made an assignment for the benefit of creditors generally, and that the plaintiffs were not attacking the assignment as well as the mortgage, did not debar them from the relief claimed.

Meriden Silver Co. v. Lee, 2 O. R. 451 followed.

Blake, Q.C., and *Kerr*, Q.C., for the plaintiff.

Osler, Q.C., and *Bull*, for the defendants, other than Ferguson.

Poster, for the defendant, Ferguson.

Ferguson, J.]

[February 25.]

FERRIS V. FERRIS.

Ante-nuptial settlement—Trusts—Executory and executed—Rule in Shelley's case—Conveyance to husband and wife—Married Woman's Property Act of 1872.

Action for construction of an ante-nuptial settlement. F., on the eve of his marriage, executed a settlement, dated January 4, 1876, wherein the intended marriage was recited, and F. agreed with his intended wife and K. to assign, transfer and set over to K., by good and sufficient conveyances, all such property as he might receive by will or otherwise from relatives, and a certain policy of insurance, to hold the same unto K. for the joint use and benefit of him, F. and his then intended wife, for and during the term of their joint lives, and from and after the decease of either of them to the use of the survivor of them during the term of his or her natural life, and from and after the decease of the survivor then to the use of the heirs of the plaintiff as he might by will direct: and then followed an agreement that articles of settlement should be executed

in pursuance of the document or settlement then signed and sealed by F.

The marriage took place on January 5, 1876; and by deed bearing date December 27, 1879, F. granted, in pursuance of the settlement, certain lands to K. and his heirs, upon trust, with the consent of F. and his wife or the survivor, to sell, lease or otherwise convey the same, and upon trust for K. to hold the moneys to arise from any such sale, and also the rents and profits of the premises, or of the unsold parts thereof, upon such trusts and subject to such powers as had been declared of the same respectively in the agreement or settlement of January 4, 1876, and upon trust to hold the moneys to arise upon any mortgage if made by K. to pay off and redeem any mortgage debt on the property, etc. F. and his wife occupied the premises till the death of the latter on November 20, 1884.

F. now brought this action, contending that the settlement was intended as a provision for his wife only, and that according to the true construction thereof, and of the deed of December 27, 1879, he was entitled to an estate in fee simple in the lands under the Rule in Shelley's case, or by way of resulting trust; and that the trusts of the settlement were exhausted, and he alone was now entitled to the land, and that K. should convey to him, which he refused to do on the ground that the infants were entitled to some interest in the lands under the limitations in the settlement.

Held, that the trusts of the settlement were executed and not executory; they were fully stated and declared; and the limitations on the face of the settlement must be construed in the same manner as similar legal limitations; and F. had an estate in fee simple under the Rule in Shelley's case.

It was not correct to say that, by reason of the transaction being after the Married Woman's Act of 1872, the husband and wife took as tenants in common for life, and that therefore the rule in Shelley's case could in any event only apply to an undivided moiety. The Married Woman's Act of 1872 has no such effect.

Walker, Q.C., for the plaintiff and trustee.

MacLennan, Q.C., for the infant defendants.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

PRACTICE.

Rose, J.]

[Jan. 12.]

BRICE V. MUNRO.

Demurrer—Setting aside as frivolous.

An appeal from the order of the Master in Chambers setting aside a demurrer to the statement of claim as frivolous was allowed.

Held, that the jurisdiction as to setting aside demurrers as frivolous should rarely be exercised where the point is a new one and is apparently raised in good faith to obtain the opinion of the Court.

Where it is evident that the party demurring is raising a question, manifestly insupportable, not admitting of argument, is in fact trifling with the Court either through gross ignorance or desire to delay, it may be convenient to at once set aside the demurrer.

The demurrer raised the question whether in an action against a shareholder, living in Ontario, in a joint stock company incorporated under a Dominion Act, it is sufficient to show that judgment had been obtained against the Company, and execution issued and returned unsatisfied in whole or in part in another Province, or whether it is necessary to show that execution has been returned unsatisfied in whole or in part in Ontario.

Held, that the demurrer was not frivolous.

Lash, Q.C., for the appeal.

Shepley, contra.

Rose, J.]

[Feb. 11.]

MOXLEY V. CANADA ATLANTIC RY. CO.

Affidavit of documents—Material for motion for better affidavit.

The usual affidavit on production of documents made by an officer of the defendants contained a statement that the defendants objected to produce their repairs book and train register, but that they would produce such portions of the books "as are relevant for inspection at the offices of the company," and a further statement that the company had "sealed up such parts of the said books as do not relate to the matters in question in this action."

The plaintiffs went to trial and called as witnesses the train despatcher, locomotive engineer and an engine driver of the defendants. The Judge at the trial refused on the evidence then given to direct the books to be unsealed.

The trial was then adjourned, and the plaintiff applied to the Master in Chambers for an order for a further and better affidavit of documents from the defendants, reading on the application the evidence taken at the trial, and asking to have the sealed up portions of the books unsealed for inspection. The Master made the order asked, and the defendants appealed to a Judge in Chambers.

Held, that the evidence taken at the trial was not proper material upon which to make an order for a better affidavit of documents.

Held, also, that as such evidence did not satisfy the Judge at the trial that he should direct the books to be unsealed, a Master or Judge in Chambers should not have been called upon to pass an opinion on the same evidence to accomplish what the plaintiff at the trial failed to do.

Held, also, that even if the evidence could be looked at, it would be impossible to say that the affidavit on production was untrue.

Jones v. Monte Video Gas Company, 5 Q. B. D. 557, considered.

Lefroy, for the appeal.

Clement, contra.

Rose, J.]

[Feb. 16.]

LYON V. MCKAY.

Affidavit on production—Motion for better affidavit.

An appeal from an order of the Master in Chambers refusing to direct plaintiff to file a better affidavit on production was dismissed.

The plaintiff, in his affidavit of documents, mentioned "Other letters and papers filed herein, the particulars of which I cannot now depose to," and stated "that such documents were filed in this Court in the motion made by defendant for his discharge from custody."

The defendant contended that the plaintiff should have scheduled these letters.

Held, that the plaintiff's affidavit was sufficient, and that the defendant must inspect the documents at the office where they were filed,

Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE.

or take the necessary steps to have them transmitted to the office of the Court at his own place of abode.

Held, that an affidavit to show the incorrectness of the affidavit of documents could not be received, following *Jones v. Monte Video Gas Co.* 2 R., 5 Q. B. D. 556.

Hoyles, for the appeal.

Clement, contra.

Master in Chambers.]

Rose, J.]

[Jan. 27.

[March 3.

MCCRANEY ET AL. v. MCLEOD; HAWKINS
ET AL., GARNISHEES.

Attachment of debts—Money due under contract.

McCraney & Son, having a judgment against McLeod, obtained and served an attaching order and garnishing summons on Hawkins, the garnishee, on the 15th March, 1884.

The debt alleged to be due from Hawkins to McLeod was for work done by McLeod upon a building contract for Hawkins.

The contract was that McLeod was to erect a house for which he was to receive from Hawkins \$1,225; \$300 when the frame was up, \$300 when the building was wholly enclosed, and the balance when the work was all completed. The building was to be completed on or before the 3rd February, 1884.

McLeod went on with the work and received the two sums of \$300, but he had not completed the building on the 3rd February, 1884. He, however, continued the work till after that time, and until after the 1st April, when the building being still unfinished, Hawkins entered, took possession, and completed it.

Held, that the debtor, having abandoned the contract, and his employer not having entered upon the work at the time of the service of the attaching order, no debt then existed according to the terms of the contract, and no promise to pay had arisen by implication; and, therefore, there was nothing upon which the attaching order could operate.

Summons discharged.

McClive, for McCraney & Son.

A. G. Hill, and *Echlin*, for opposing creditors of McLeod.

Eddis, for the garnishees.

Boyd, C.]

[March 4.

WHITE v. BEEMER.

Reference under sec. 48 O. J. A.—Jurisdiction of Master in Chambers and local judges.

A county judge sitting as local Master under rule 422 O. J. A. made an order, purporting to be under sec. 48 O. J. A., referring all the matters in difference in the action for trial to an official referee.

Upon appeal, the defendant urged that the judge had no power to make the order.

Held, that as the Master in Chambers has not the power to deal with matters of reference under the C. L. P. Act, he (or a local judge sitting as Master under rule 422 O. J. A.) should not, *a fortiori*, make orders under sec. 48 O. J. A., for by that means the findings of the referee become equivalent to the verdict of a jury, and perhaps can only be moved against before the Divisional Court.

Edminson, for the appeal.

G. Tate Blackstock, contra.

CORRESPONDENCE.

STANDARD TIME.

To the Editor of THE LAW JOURNAL:—

DEAR SIR,—The difference of local time according to longitude having been found very inconvenient by the managers of railways in Canada and the United States, especially as to their timetables, a conference of these gentlemen was held in 1883, at which it was decided to recommend for adoption a system of *standard time* by which railways should be run, each 15° of longitude (one hour in time) to form a time zone, within which all railways should be run by it, the time of the centre meridian of each zone being taken as the standard for the seven and a-half degrees on each side of it, and that of 75° of West Longitude from Greenwich being chosen as the standard to be used by railways within the territory bounded by the meridians of 67½° and 82½°, including the Atlantic States and a large part of Canada. The same rule was to be observed for the whole distance across our continent. This system was nominally adopted by a very large majority of the American and Canadian railways. But it was found difficult to abide by it in some cases in consequence of the

CORRESPONDENCE.

sudden jump of an hour in time in passing from one time zone to another, as many railways in both countries must do; and it seems the Grand Trunk, Great Western and Canadian Pacific are each run into two time zones within Ontario, and the Intercolonial into two such zones in Quebec, New Brunswick and Nova Scotia. There must be many railways in the United States which violate the conference rule in like manner; and this is a very great imperfection in the rule itself. But this is a matter for the consideration of the railway magnates themselves. The matter to which I desire to call your attention is the legal aspect of the case.

Many people (not lawyers, of course) seem to suppose that standard time has become *legal* time, and seem inclined to govern themselves and their doings by it, thus putting the railway managers in the place of the Legislature. Now, looking for the moment at Ontario alone, standard time at London is about twenty-four minutes earlier than legal time; and there are places in Essex where the jump occurs from one time zone to another, and at which the standard time is an hour earlier on one side of an invisible line than on the other. Now our Act 32-33 V., c. 21, § 1, defines "night" for the purposes of that Act as commencing at "nine o'clock in the evening of each day and ending at six o'clock in the morning of the next succeeding day," so that by standard time it would be night on one side of the line when it was day on the other; and by sec. 50 *burglary* is defined to be the commission of certain offences in the *night* only, so that the same offence would be burglary on one side the line and not on the other. Mr. Robertson, of Hamilton, has now a Bill before the House of Commons making burglary punishable by imprisonment in the penitentiary for life. Fancy a man tried for burglary in the neighbourhood of that line, and a question arising as to the hour when the offence was committed. But, even in London, the offence would be burglary twenty-four minutes earlier in the evening by standard than by legal time, and the offender, if he did not break in, would have twenty-four minutes longer to break out. Then, again, the Ontario Revised Statute, c. 111, § 22, provides that no Registrar shall receive any instrument for registration except within the hours of ten in the forenoon and four in the afternoon, and he is to endorse on the instrument registered not only the year, month and day, but the hour and minute of registration. Now suppose him to shut and open his office in London by standard time, he would shut it twenty-four minutes before, and open it twenty-four minutes after the legal time. Might he not do serious wrong to a person whose mortgage or other claim he received or refused illegally? and might he not be

liable in heavy damages for doing so? Or suppose a Returning Officer closing or opening his poll twenty-four minutes before or after the legal time; or a tavern-keeper doing the same by his bar; or a case of insurance with a policy expiring at noon, and a loss occurring after *standard* but before *legal* noon. And so of an infinite variety of cases, where time is of the essence of the act done and its effect. In England, where they look closely into the consequences of such things, difficulties of this kind were foreseen when Greenwich time was adopted for all England in 1880, and an Act, 43-44 V., c. 9, was passed making it *legal time*, which, of course, they knew it would not otherwise be. I can believe that the advantages of the change may there have been greater than the disadvantages; for England is comparatively small, and the greatest difference between standard and the old legal time is only about twenty-two minutes, and there is no jump of an hour; the sea bounds the time zone, so that no one can mistake it; and they have taken care to leave Dublin time for Ireland. Our case, and that of the United States, is different. We have five jumps of one hour each; and with all due respect for the railway authorities, I think it would have been better if they had adopted or would adopt the time of 90° West Longitude as the standard for the United States and Canada right across the continent—one railway time without jumps or breaks, and the two oceans for the limits of the time zone. A clock with two minute hands, or one hand with two points, would show legal and standard time at once; and there would be no places with two standard times, as there are now at the boundary of each time zone. I am informed that the authorities of the Naval Observatory at Washington hold the same opinion. If any but the present legal time is to be used *as such* the change should be made by law, as it was in England. In the United States, it appears, that every State has power to fix its own legal time; Congress has it only for the District of Columbia (ten miles square, I believe), and has exercised the power by adopting standard time of 75° West Long. But the said District is smaller than England, and there could hardly be a minute of time difference between any two places in it. In Canada, I think the power rests with the Dominion Government. I am of opinion that there should be no change in the legal time; that Canada is too big to adopt one legal time for its sixty or seventy degrees of longitude, and that no jump system could be made rational and workable in law. But I hold that the Dominion Government and the Governments of the several Provinces should state authoritatively that the mean solar time of each place remains as hitherto

LAW STUDENTS' DEPARTMENT.

the *legal* time thereat, and that all officers and functionaries must so consider it, and open and close their offices, and be governed in the performance of their duties, by it and by no other. At the International Conference for the purpose of fixing a prime meridian and universal day, held at Washington in October last,¹ such universal day to begin and end at the same moment all over the world as it does at Greenwich, was adopted "for all the purposes for which it may be *found convenient*, and which shall not interfere with the use of local or other standard time where desirable." It would have made the day at Toronto begin at seventeen and a-half minutes after what we now call five p.m., and Sunday would begin at that hour on Saturday, and end at the same on Sunday. I think this would not be "found convenient," and that we in Canada shall not adopt it. It has always been used at Greenwich, I believe, for astronomical purposes, except that the day began at noon, and now begins at midnight. It is excellent for scientific purposes, and, for the adoption of Greenwich as the First Meridian, England, and all men of English blood and tongue owe a debt of gratitude to the conference and to Sandford Fleming.

I am, dear sir, very truly yours,

W.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.

EQUITY.—HONORS.

1. "Contracts and conditions in general restraint of trade, or beyond what is reasonably necessary for the protection of the party seeking protection, are void, as tending to discourage industry, enterprise, and just competition." Illustrate this passage by two examples.

2. A. employs B. to procure for him a property suitable for manufacturing purposes. B. enters into a binding agreement with C. for the purchase of a suitable property in B.'s own name for \$10,000. B. then, without disclosing these facts, draws the attention of A. to the property, and the latter assents to the view that the property is worth \$15,000, and expresses his willingness to give that sum for it. B. thereupon procures C. to convey the property to A. for \$15,000, of which sum C. is to receive \$10,000 and B. the sum of \$5,000. A. afterwards learns the facts of the case, and

brings his action against B., claiming that he is entitled at his option to recover the \$5,000 from B., or to have the sale rescinded. What are the rights of the parties?

3. State the effect of the Statute 13 Eliz. cap. 5. with regard to the validity of a conveyance or assignment of real or personal property, and with regard to the persons who may avail themselves of the provisions of said statute.

4. Illustrate by an example the distinction drawn by courts of equity between the construction to be put upon executory trusts, and to be put upon executed trusts.

5. A. purchases and pays for three pieces of land known respectively as X. Y. Z., and under A.'s instructions the vendor conveys lot X. to A.'s family physician, lot Y. to A.'s son, and lot Z. to A.'s wife. What interests, if any, do the physician, the son, and the wife take respectively, and why?

6. What distinction does equity draw between its recognition of a perfect and of an imperfect gift, where the donor subsequently seeks to revoke the gift? Give an example of each.

7. State the nature of a solicitor's lien for costs.

SECOND INTERMEDIATE.

SMITH'S COMMON LAW.—HONORS.

1. What is meant by *scandalum magnatum* in the law of slander?

2. A. and B. are proprietors of adjoining lands, with no fence between. A.'s cattle trespass on B.'s land and B.'s cattle on A.'s land. Is there any liability for such trespasses? Explain.

3. If a principal gives an order to an agent in such ambiguous terms as to be susceptible of two different meanings, and the agent bona fide adopts and acts upon the meaning not intended by the principal, will the act of the agent be considered in law to be authorized or unauthorized, and why?

4. Explain the difference between *easements* and *profits à prendre*.

5. In an action for malicious prosecution, on which party does the onus of proof rest, as to the question of reasonable and probable cause?

6. Explain the difference between self-serving and self-disserving evidence.

7. Give all the instances you can in which an assault and battery may be justifiable.

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DIARY FOR APRIL.

- 3. Fri.....*Good Friday.* Prince Leopold born, 1853.
- 4. Sat.....Canada discovered, 1499.
- 5. Sun.....*Easter.*
- 6. Mon.....*Easter Monday.* Non-jury sittings of County Court (except York). County Court and Surrogate Court Terms commence.
- 11. Sat.....County Court and Surrogate Court Terms end.
- 12. Sun.....*1st Sunday after Easter.*
- 13. Mon.....Princess Beatrice born, 1857.

TORONTO, APRIL 1, 1885.

THE subject of prisoners giving evidence on their own behalf has again come to the front. It has been a favourite subject for theorists to discuss. But the discussion has not brought out any necessity for the change. There are, of course, plausible arguments in its favour, but most cogent and practical ones against it. At all events, it is eminently one of those matters which should not be decided without much more serious and lengthened attention than it has yet received in this country. It might be different if there were any evident or persistent demand for the change; but there is no such demand. If a prisoner were to refuse to testify it would be accepted as an evidence of guilt, although there might often be circumstances which would induce an innocent man to refrain from explanations. The timid, nervous, but innocent, prisoner often would equally ensure his condemnation by refraining to give evidence, or by giving it in such a way, as, by his hesitation or nervous self-contradiction, to induce a belief in his guilt, whilst the hardened and guilty scoundrel, who could cleverly invent and boldly stick to a lie, would often escape. "Guilty," or "not guilty" would become a question of temperament or experience in crime. But

more than all, the crime of perjury would flourish as it has never flourished before. It has largely increased since litigants have given evidence on their own behalf. How much more when a man's liberty or even his life would depend upon it. Let us hasten slowly in this matter, even if it is desirable to go in that direction at all.

WE find in a recent letter to *The Times* a suggestion which seems a most admirable one. The writer, who dates his letter at Perth, Western Australia, says:—

Now that the subject of Imperial Federation is occupying the attention of the powers that be will you kindly allow me space for a suggestion?

The want of a system of reciprocal legal procedure between the mother country and the colonies, as well as between the colonies themselves, has been a long-felt evil, and I venture to think that with the increasing commercial relations the time has now arrived, and the opportunity too, when some steps should be taken to remedy the evil. A debtor, who now betakes himself to another colony with a letter of credit on a bank there, has only to withdraw his balance from his local bank and remain where he is, and his creditors find themselves foiled. The evil is, however, not confined to cases of contract, but abounds in cases of tort, where the wrongdoer finds an easy escape from the consequences of his acts, provided they are not criminal, by taking a ticket for 'the other side.'

There is, of course, the remedy of a *ne exeat*, and the alternative of beginning an action in the courts of the country where the defendant is to be found; but they are sadly deficient remedies, and often prove worse than the disease.

A short clause in the Federation Enabling Bill, authorizing an execution in the mother country, or in any colony, of any legal process issued out of any of the Superior Courts of any other colony, and *vice versa*, would, I have no doubt, prove beneficial to all concerned.

It seems a pity that such a suggestion as this should be forgotten. Why should

ENGLISH BILLS OF EXCHANGE ACT.

not Her Majesty's writs run into all parts of Her Majesty's dominions? They all alike issue out of the Queen's Courts, and there seems no reason why they should not be executed and acted upon by her officials in all parts of the Empire. Why, for example, should not writs of execution issued upon a judgment of the Queen's Bench Division here or any other of our Courts be enforceable against property of the judgment debtor in England or Australia as well as here. With proper safeguards we believe such a system would be highly conducive to the ends of law and justice. Besides which it would be a step towards making the Empire one in fact and deed, instead of chiefly in sentiment as at present, and would illustrate the many benefits which we believe will result to each of the parts when the whole of the British nationality is drawn more closely together.

It is a matter of surprise that more public attention has not been called in this country to the recent English Bills of Exchange Act, 1882. It is in reality a most admirable code of law relating to bills of exchange, promissory notes and cheques; and being for the most part, if not altogether, merely declaratory of the law, its propositions may be said to be as binding here as in England. It would be useless for us to reprint any portion of its provisions; all we desire to do is to call the attention of our readers to its existence. The progress of codification in England is slow but sure, and the slower it is no doubt the better, for the task of satisfactorily transmitting case law into a code is one requiring the most profound learning and immense labour, and involves a great responsibility. The Bills of Exchange Act is now statute law. Then there is Stephen's Digest of Criminal Law, and Law of Evidence, one or other of which will probably ultimately receive

parliamentary sanction. Every reader of Pollock on Contracts knows that in India contract law is already codified. Lastly, we have before us a very interesting specimen code of English Equity Case Law, by Charles F. Trower, M.A., of the Inner Temple, Barrister-at-law. The learned author prefaces his code by the remark: "Why should not the case law of England be codified like other branches of the law? America has been before us in this, as she was in her fusion of law and equity; and even our own law publishers are pressing on the public a scheme of revised and abridged case law, and looking to those who are qualified to do so to pronounce upon it." His plan is to omit all cases of no authority by reason of being over-ruled, reversed, or discharged, all cases of weakened authority, all superfluous cases, all special cases, all *sembles*, queries and *obiter dicta*, and his code consists of the residuum left after the above deductions, and is a series of categorical condensed substantive propositions, placed table-wise, and arranged alphabetically under generic and specific heads (with cross references) of the subject matter to which it refers. Anyone who likes to refer back to the English *Law Magazine and Review* of August 1883-84, will find Mr. Trower's specimen code there. It seems to us Mr. Trower has hit upon not only a great scheme, but one which must ultimately be adopted and acted upon. The ever increasing multiplication of reported decisions seems to us to be degrading the profession of the law and the administration of it. It is rendering it more and more difficult either to argue a case upon principle, or to get it decided upon principle. The one thing to do seems to be to hunt out as many decided cases as work in your favour as possible, without much regard to the reasoning on which the judgments are based, and hurl them at the judges. The only remedy

SIR GEORGE CARTIER.

seems to us to be the formation of a code of case law by a state commission composed of the ablest jurists attainable. Probably no country but England could at present find the men to do the work. No doubt it would be a gigantic undertaking but it could be done, and such a code once adopted could be revised at stated intervals. Then the touchstone in all cases would be the propositions of the code as modified by the decided cases since the last revision. A large measure of certainty would take the place of uncertainty; an immense number of unsound decisions by incompetent judges would be consigned to oblivion, and the evil tendency of the present state of things would cease.

SIR GEORGE CARTIER AND THE CIVIL CODE.

WE have been reminded pleasantly, but a little reproachfully, that our columns have never contained a tribute to the memory of the late Sir George Cartier, an eminent statesman and lawyer under whose auspices, as Attorney-General for Lower Canada, the Civil Code of that Province—the first work of the kind ever attempted in Canada—was projected, drafted, and brought into force as law in 1866. A lawyer who loved his profession and its professors, and its supporters too, for his favourite toast at a Bar dinner was "The Client," adding a few words in praise of that always welcome personage. We are going to try to remedy this omission in our present number by the insertion of two articles, the first by a hand which will not be suspected of flattery, and the other by an old and valued contributor of ours, a lover of our deceased brother in the law, the most English of French-Canadians, an Englishman speaking French.

The first extract, taken from a recent issue of *The Week*, is as follows:—

Sir George Cartier, whose statue was unveiled the other day by his old friend and colleague Sir John Macdonald, may be classed among the best representative French Canadians. More perhaps than any other of our public men he combined in his own person the theoretical and the practical Reformer. In his career were seen strong marks of the rude transition from the oligarchical to the constitutional system. Against the former at an age when the blood is hot and wisdom young he fought at St. Dennis, where discipline prevailed over ill-armed enthusiasm, and he found refuge in exile with a price upon his head. The belief was for some time general that in his attempts to escape he had perished miserably in the woods. Exile did not sour his temper, and when, the storm having blown over, he returned, no one was jealous of the undistinguished young advocate, who was only known for the hair-brained adventure in which he had taken part, and in which nothing but defeat had ever been possible; and no one in his wildest dreams saw in the returned exile the future Premier, no one had any interest in curbing his ambition and holding him back. Cartier did not, like Papineau, in 1848 look to France for a model; he accepted in good faith the new Constitution, and determined to make the best of it. The redeeming point in the Conquest of 1760 was in his estimation that it saved Canada from the misery and the infamies of the French Revolution. Though he bore his part in carrying the leading measures of his time, Cartier's best monument is to be found in the Code of Civil Law and the Code of Procedure: a code common to the whole country was an achievement impossible to our public men. In the first he saw the individuality and the nationality of his race and his province. He used to say, half in jest and half in earnest, though he could not seriously have believed the prediction, that Ontario would one day borrow the civil code from her French neighbour. A French-speaking Englishman, as he would on occasion call himself, he settled in favour of his race the long-contested question of which law should prevail in the Eastern Townships, French or English, with the result that the French population which was before gaining ground, bids fair entirely to swamp the English in a region where Lord John Russell thought it desirable to build up a rampart of English colonists between the French settlements and the American frontier: a project founded on a state of things which has entirely passed away. Judicial decentralization in Quebec was one of Cartier's most difficult achievements; the local opposition aroused by dividing the Province into nineteen new judicial districts being of the most formidable nature.

SIR GEORGE CARTIER—RECENT ENGLISH DECISIONS.

When in 1857 he succeeded Dr. Taché as leader of the Conservatives of Lower Canada, Cartier, breaking through the narrow limits of party, took two Liberals, M. Sicotte and M. Belleau, into the Cabinet, and made overtures to M. Dorion which the Liberal Chief was not able to accept. On the Lysons Militia Bill his immediate followers, yielding to vague fears among their constituents of the conscription not less than the great increase of expense, deserted in numbers, leaving him with only a small minority at his back. A good Catholic, he had yet the courage to defend the rights of the State against the encroachments of Bishop Bourget, at a time when the Bishop's influence was omnipotent: an act of duty which cost him his seat in Montréal. He saw the beginning and the end of the Legislative union which he cordially accepted and assisted in working, and which when it had served its purpose he was among the first to assist in superseding by the Confederation. Whatever success he attained was due in a large measure to hard labour and perseverance; for the first fifteen years of his public life he was, when not disturbed, as he was often, chained to his desk fifteen hours a day; and for thirty years fancied that to get through his task he must labour seven days a week.

Whilst agreeing in the main with the sentiments above expressed we do not think there was any glory attaching to the efforts of this eminent man in favour of decentralisation as it has proved most injurious to the bench of his own Province, a fact of which some of our radical reformers (using these words in a literal and not in a political sense) in Ontario would do well to take note; nor is working seven days a week anything but utter folly, even from the lowest point of view, as the wreck of many brilliant intellects and busy hands scattered along life's legal pathway abundantly proves.

The other article appeared as a letter in an Ottawa paper some weeks since:—

Two Ministers, who had been his colleagues and knew him well, spoke at the unveiling of the statute of the late Sir George Cartier, and eloquently and lovingly eulogized his qualities as a statesman and the great services he rendered to our country; and he deserved their praise, for no man ever worked more earnestly and impartially for the welfare of Canada and of Canadians of every race and creed. Here in Ottawa he will be

long remembered for his kindly geniality; and very many of our citizens and visitors will recollect the pleasant evenings spent at his house on Metcalfe street, when arranging his guests in make-believe canoes, with make-believe paddles in their hands, he would sing and make them join in his favourite boat song, with the *refrain* of which Sir John, in concluding his speech, so happily apostrophised his old friend and colleague. I feel sure that they, and all who knew Sir George, will join Sir John in saying from their hearts as I do—

"Il'y a longtemps que je t'aime,
Jamais je ne t'oublierai."

Not through the statue which his country's love
Hath to his honour raised, but through the deeds
And qualities which won that love, shall he,
The patriot whom we mourn, forever live
In true Canadian hearts of every race.
And chiefly through his strong and steadfast will
That difference of race, or creed, or tongue,
Should not divide Canadians, but that all
Should be one people striving for one end,
The common good of all. His country stretched
From Louisbourg to far Vancouver's Isle
And claimed and had his patriot love and care.
And thus he won a high and honoured place
Among the worthiest of his name and race.

RECENT ENGLISH DECISIONS.

THE only remaining case in the February number of the Law Reports for the Queen's Bench Division to which we think it necessary to refer is an important one on the subject of privileged communication to legal advisers, viz., that of *The Queen v. Cox and Railton* (14 Q. B. D. 153), in which the Court ruled that when a client applies to a legal adviser for advice intended to facilitate, or to guide the client in the commission of a crime or fraud (the legal adviser being ignorant of the purposes for which his advice is wanted), the communication is not protected on the score of privilege, but on the contrary is admissible in evidence in a criminal proceeding against the client, arising out of the fraud contemplated by him, at the time of making the communication, although the solicitor himself may have been no party to the fraud. In this case the defendants applied to a solicitor for information to enable them to dispose

RECENT ENGLISH DECISIONS.

of certain property so as to defeat a creditor who was about to obtain execution; and in a subsequent indictment against them for conspiracy to defraud the creditor, the evidence of the solicitor, as to their communication made to him under these circumstances, was held to be admissible.

The Court adopted the following rule laid down by Lord Brougham on the subject of privileged communications in *Greenough v. Gaskell*, 1 My. & K. 98: "If, touching matters that come within the ordinary scope of professional employment, they (the legal advisers) received a communication in their professional capacity, either from a client, or, on his account, and for his benefit, in the transaction of his business, or, which amounts to the same thing, if they commit to paper in the course of their employment on his behalf, matters which they know only through their professional relation to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information, or produce the papers, in any Court of Law or Equity either as party or as witness;" but they proceed to point out that consultations with a solicitor for the purpose of enabling the client to see how best to commit a fraud, are not within "the ordinary scope of professional employment," and are therefore not within the terms of the rule. Of course communications made before the commission of a crime or fraud, for the purpose of being helped or guided in committing it, stand on a different footing, as the Court is careful to point out, from communications made subsequent to its commission, with the view to being defended. But, Mr. Justice Stephen adds: "we are far from saying, that the question whether the advice was taken before, or after, the offence, will always be decisive as to the admissibility of such evidence."

MUTUAL RESTRICTIVE COVENANTS — ACQUIESCENCE IN BREACH.

The first case to be noticed in the February number of the Law Reports in the Chancery Division is that of *Sayers v. Collyer* (28 Ch. D. 103) a decision of the Court of Appeal affirming a judgment of Pearson, J. on a different ground from those on which he had proceeded. A building estate had been laid out into lots which were sold to different purchasers, each of whom covenanted with the vendors, and the purchasers of the other lots, not to build a shop on his land, or use his house for carrying on any trade therein. One of the purchasers, who occupied his house as a private residence, brought the action against the owner of another lot, who was using his house as a beer shop, to restrain him from breaking his covenant, and for damages. It appeared, that for three years before the action was commenced, the plaintiff knew that the defendant was using his house as a beer shop, and had himself bought beer at it. There was evidence, that some of the houses built on other lots had been for some time used as shops, and that some of the houses near the plaintiff's were occupied by more than one family at weekly rents. It was held by the Court (differing on this point from Pearson, J.) that the change in the character of the neighbourhood, not being caused by the plaintiff's conduct, was no ground for refusing him relief, yet, that he had lost his right thereto, either by way of injunction or damages, through his acquiescence in the proceedings of the defendant.

ELECTION AGAINST VOIDABLE COVENANT BY MARRIED WOMAN—COMPENSATION TO THOSE DISAPPOINTED.

The next case is *Re Vardon's Trusts* (28 Ch. D. 124), a decision on a branch of the law not often invoked in this Province. A married woman at the time of her marriage being an infant executed a marriage

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settlement and thereby covenanted to settle after acquired property to the uses of the settlement. Under the settlement she was entitled to a life estate subject to a clause against anticipation. After she attained twenty-one a bequest was made to her of certain property to her separate use. This property she elected to retain, and not to settle pursuant to her covenant; and it was held by Kay, J., dissenting from *Smith v. Lucas*, 18 Ch. D. 531, and *In re Wheatley*, 27 Ch. D. 606, and following in preference the decision of Lord Hatherley in *Willoughby v. Middleton*, 2 J. & H. 344, that the life estate of the married woman under the settlement, notwithstanding the restraint against anticipation, was liable to be sequestered, to make compensation to those disappointed by her election to avoid her covenant to settle the after acquired property.

WILL—CLERICAL ERROR—CORRECTION BY REFERENCE TO CONTEXT.

Passing over a couple of cases which have no special interest in this Province we come to *In re Northens' Estate, Salt v. Pym* (28 Ch. D. 153), which is a decision of Chitty, J., upon the construction of a will. The testator owned two estates, one *Lea Knowl*, the other *Croxton*. *Lea Knowl* he devised in trust for his daughter, W., her husband and children, with power to his trustees to sell the same at the request of W., and hold the proceeds to the same trusts as *Lea Knowl* was devised. The *Croxton* estate he devised in trust for his daughter C., her husband and children, and he also empowered his trustees to sell the *Croxton* estate at the request of C., and hold the proceeds "in trust for such person and persons, and for such estates, ends, interests and purposes, powers, provisoes and conditions as are hereinbefore limited, expressed and declared, of, and concerning the said *Lea Knowl* estate hereby devised, as to such, and so many of them as shall at the time of sale have

been existing undetermined and capable of taking effect;" and it was held that the words "*Lea Knowl*" in the latter clause might be rejected and read as "*Croxton* estate," because to read the words "the said *Lea Knowl* estate" in this clause literally and grammatically, would be making the will lead to a manifest absurdity or incongruity, as it was apparent, that the testator intended, that the proceeds of each estate should be held for the benefit of the *cestuis que trustent* respectively entitled to the benefit of the estate, from which the proceeds should be derived.

The only other cases in the February number of the reports of the Chancery Division to which it is necessary to refer are *Hurst v. Hurst*, and *In re Klæbe*, notes of which will be found in our notes of English practice cases.

An important Bill has, we understand, been prepared for introduction in the House of Commons to amend and consolidate the Acts in force in Canada respecting Bills of Exchange and Promissory Notes. It will be a consolidation of the various statutes now in force and introduce other provisions and propositions of law largely taken from the English Bills of Exchange Act referred to in another place.

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[Q. B. Div.]

NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**QUEEN'S BENCH DIVISION.**

IN BANCO.

ROSS v. MACHAR.*Joint stock company—Shareholder.*

Shares had been assigned in the books of the company by the managing director, in his own name, as to 20 shares, and by him, as attorney for another, as to 30 shares, to the defendant, who did not sign the usual formal acceptance for any of them; but a certificate under the corporate seal of the company and the signature of the President, Vice-President and Secretary of the Company was sent to him certifying him to be the registered owner of the 20 shares, and defendant had, in a bill filed against a third party for fraudulently inducing him to purchase the shares for which he had paid \$500, admitted that he had purchased these 50 shares.

Held, that the defendant was a shareholder as to the 50 shares.

Semble, that if any further formal act were required to be done on the part of defendant to constitute him a shareholder, he could be directed to perform it.

Under the circumstances shown in the evidence stated below,

Held (O'CONNOR, J., dissenting), that secondary evidence of the contents of the minute book of the company's directors showing the making of certain calls, was improperly rejected.

By 41 Vict. ch. 58 (D), the three plaintiffs were appointed "joint assignees" of the Canada Agricultural Insurance Company for the purpose of winding up under 41 Vict. ch. 21 (D). Two of the plaintiffs, the third being unable to attend through illness, met on the 2nd January, 1879, and made the fourth and fifth calls of ten per cent. on the stock of the company.

Held, that the assignees must all join in making calls, and that the fourth and fifth calls were, therefore, invalid.

Held, also, that a meeting of the three joint assignees on 27th of January, after notice of the fourth and fifth calls had been mailed on the 13th January of purporting to confirm the action of the two assignees of 2nd January, had not that effect.

ROBERTS v. SHERMAN.*Assignment—R. S. O. c. 119, s.-s. 1, 2.*

Assignment for creditors not being within Chattel Mortgage Act do not require registration.

MACKAY v. SHERMAN.

Caldwell v. McLaren, L. R. 9 App. Cas. 352, followed, and *held*, plaintiff could not recover tolls for slides and improvements in the bed of the stream; but could for any improvements outside the channel and on plaintiff's land.

MARIN v. GRAVER.*Landlord and tenant—Possession—Damages.*

In action of tenant against landlord for not giving possession,

Held (WILSON, C. J., dissenting), the proper measure of damages is the difference between what tenant was to pay and what possession was really worth.

**IN RE WOODHOUSE v. THE CORPORATION
OF THE TOWN OF LINDSAY.***Drainage by-law—Use of sewer without leave—
Validity of by-law.*

A municipal corporation passed a by-law for the construction of a sewer, without limiting the purposes for which it was to be used, and subsequently passed another by-law regulating how it might be tapped for drainage purposes, and enacting that no one should drain into it without permission from the municipal council first obtained, and specifying a certain rate of payment for the use of it when so permitted. The applicant got no leave from the council or any committee thereof to use the sewer, but several members of the council gave him permission to connect some water closets with it on condition of his paying, whenever called upon, whatever was reasonable for the privilege.

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Held, that the sewer was constructed for general drainage purposes, including that of water closets; but that the permission given to the applicant so to use it did not bind the council which could compel him to cut off the connection, as he had not obtained their consent to make the same, nor paid the rate provided by the by-law; and that the fact of his having enjoyed the privilege for several years did not place him in any better position than he was at the first.

Semble, that even if he had the legal right to use the sewer, either the corporation or the local Board of Health could, upon the facts stated below, under 47 Vict. ch. 32, sub-sec. 13, and ch. 38, sec. 12, have passed a by-law compelling him to cut off his connection.

Quare, whether, after the formation of the local Board of Health, the by-laws provided for by 47 Vict. ch. 32, sec. 13, should be passed by the corporation or by the Board of Health under ch. 38, sec. 12. The motion to quash the by-law was therefore refused, but without costs, as the applicant had been led into his position by the indiscretion of certain members of the corporation.

Hudspeth, Q.C., for motion.

Aylesworth and *Martin*, contra.

MOLSON'S BANK V. TASKER.

Principal and surety—Change of liability—Discharge of surety.

Defendant endorsed C.'s note to secure advances to him on grain by Bank, the representation being that it was a mere formal matter; that but 75 per cent. of value of grain could be loaned, and warehouse receipts taken, and the bank agent would see that the grain continued in store and would hold it to secure the loan and credit any sales in C.'s note. Defendant afterwards was got to sign a sealed guarantee which varied defendant's position by permitting plaintiffs to abandon or release the grain.

Held, guarantee void, and plaintiffs could not recover on it.

THOMAS V. CAMERON.

Lease—Distress.

C. paid rent due by R. to H. T. and to secure same, and C. took assignment of rest of term from

R., who then took lease from C. for three months, the rent being the advances of C. to R.

Held, that such a lease, though binding between parties, could not create the relation of landlord and tenant, so that C. could distrain goods of third parties.

REGINA V. BUNTING ET AL.

Criminal law—Conspiracy to bribe Members of Parliament—Pleading.

On demurrer to an indictment set out below for conspiracy to bring about a change in the Government of the Province of Ontario, by bribing members of the legislature to vote against the Government.

Held (O'CONNOR, J., dissenting), 1. That an indictable offence was disclosed; that a conspiracy to bribe members of parliament is a misdemeanour at common law, and as such indictable. 2. That the jurisdiction given to the legislature by R. S. O. ch. 12, secs. 45, 46, 47, 48, to punish as for a contempt, does not oust the jurisdiction of the Courts where the offence is of a criminal character, but that the same Act may be in one aspect a contempt of the legislature, and in another aspect a misdemeanour. 3. That the Legislative Assembly has no criminal jurisdiction, and hence no jurisdiction over the matter considered as a criminal offence. 4. That the indictment, considered as a pleading, sufficiently stated the offence intended to be charged.

Per O'CONNOR, J. 1. That the bribery of a member of parliament in a matter concerning parliament or parliamentary business is not an indictable offence at common law, and has not been made so by any statute. 2. That in all matters and offences done in contravention of the law and constitution of parliament, with the exception of treason, felony and breaches of the peace, parliament alone has jurisdiction, and the ordinary courts, civil and criminal, have no jurisdiction. 3. That the *lex et consuetudo parliamenti* reserves to the High Court of Parliament exclusive jurisdiction to deal with all matters relating to its own dignity, or concerning its powers, its members and its business, with the above three exceptions.

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CONWAY v. C. P. R. Co.

Railway—Fencing.

Held, that under the Railway Act of 1879 as amended, the railway company are not bound to fence, except as against a proprietor or tenant, and that the company are not therefore liable to a mere squatter for the killing of his horses without other negligence than their omission to fence as against him.

Osler, Q.C., and *Gorman*, for plaintiff.

H. Cameron, Q.C., and *White*, contra.

LONGWAY v. AVISON.

Action against J. P.—Immediate return of conviction.

In an action against two justices of the peace to recover a penalty for not making an immediate return of a conviction had before them to the clerk of the peace.

Held, that it is a question for the jury whether under the circumstances of any particular case the return made is immediate.

Held, also, that in a *qui tam* action the finding of the jury upon such a question is conclusive.

Rose, J.]

TAYLOR v. McCULLOUGH.

Assault—Prosecution—Civil action—Pleading.

Held, on demurrer to plea, that a civil action for assault cannot proceed pending criminal prosecution for same.

Rose, J.]

BRICE v. MUNRO.

Action for unpaid shares in foreign Co.—40 Vict. ch. 43, sec. 47 (D)—Non issue of execution in Ontario—Pleading.

In an action by a creditor of the Morton Dairy Co., Limited, against defendants, to recover the amount of unpaid shares in that company under 40 Vict. ch. 43, sec. 47 (D), the head office of the company being in Quebec, where the plaintiff's judgment against the company had been obtained and execution returned thereon unsatisfied, a demurrer to the statement of claim was allowed because it did not appear that an execution in Ontario against the company had been returned unsatisfied.

Shepley, for demurrer.

Lash, Q.C., contra.

Rose, J.]

REGINA v. SMITH.

Patent of invention—35 Vict. ch. 26 (D)—Delivery of model.

Held, that 35 Vict. ch. 26 (D), does not require delivery of a model prior to the issue of a patent of invention.

In this case, after the granting of the patent, the commissioner wrote to the applicant that the patent had been granted, and that it would be forwarded on receipt of the model, which was sent, and the patent was then forwarded.

Semble, that delivery of the model prior to the grant of the patent was dispensed with, merely requiring it to be sent before the patent could be forwarded.

Gormully, for demurrer.

Foster, contra.

Rose, J.]

REGINA v. LACKIE.

Fraudulent removal of goods—11 Geo. II. ch. 19, sec. 4—Compelled to testify.

The fraudulent removal of goods under 11 Geo. II. ch. 19, sec. 4 is a crime, and a conviction was therefore quashed with costs against the landlord, because the defendant had been compelled to give evidence in the prosecution.

Shepley, for motion.

Watson, contra.

RE WARIN.

Water lots—Navigation—Easement—Prescription.

A., lessee for years of west half (being practically vacant) of water lot 17 in Toronto Harbour, B., proprietor of east half of same lot on which exists a wharf and storehouse erected more than twenty years before suit, and so near the line dividing the half lots that vessels could not call at the west side of the wharf, where all the business had been done, without passing over the half lot of A., and partially occupying the same while lying at the wharf. B. and his successors had also laid up vessels at their wharf in winter, two or three abreast, occupying part of A's half lot nearly every year since the erection of the wharf, and about eighteen years before suit built on the wharf an elevator for receiving and shipping grain at the west side of the wharf.

In 1882 A. put up a notice warning persons

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against trespassing on his half water lot, which vessels passing to B.'s wharf knocked down. Subsequently in the same year A. drove certain piles into the soil of his own half lot, ostensibly as a foundation for certain buildings for boat houses, and was proceeding to drive others which would have had the effect of obstructing the passage to B.'s wharf. B. met this by moving vessels to and from his wharf, and finally by mooring vessels to his wharf and extending into the waters on A.'s half lot thus preventing A. from driving more piles.

In trespass by plaintiff, B. claimed, first, an easement by prescription and non-existing grant to the owners of the fee, whose lessee, Taylor, who erected said wharf, was over A.'s half lot to the extent necessary to allow vessels to pass to and from his wharf and to lie up there; secondly, that the waters covering said water lot were navigable waters, part of Lake Ontario and Toronto Harbour, and that the wharf was a construction within the law for the purpose of enabling the use of the harbour and the safe and useful navigation of said water, and that the act of A. was a wrongful interference and an obstruction of the use of the said navigable waters which B. was entitled to and did abate.

Held, 1. The waters covering said lot 17 were part of the navigable waters of Lake Ontario, and the same law was applicable thereto as in the case of tidal waters in the absence of a valid grant, the soil being vested in the Crown, subject to the *jus publicum* of navigation. 2. That the Act 23 Vict. c. 2, sec. 35, R. S. O. c. 23, sec. 47 gives authority to the Crown to grant water lots, and the grant of water lot 17 by the description of "land covered with water" was valid under these enactments, and sufficient to pass to the grantee and his representatives the soil and the *jus publicum* for navigation and the like in the water which could be built upon, filled up or otherwise dealt with as might be thought proper. 3. That so long as A.'s water was unenclosed or unoccupied any one might pass over or across it without being liable to be treated as a trespasser, and an easement such as that claimed could not therefore be acquired. 4. That the claim to an easement was not founded upon an enjoyment *nec clam, nec vi, nec precario*, and could not be sustained. 5. That the evidence showed that the user of the plaintiff's water lot was not "as of right," and the finding of the jury was

warranted by the evidence. 6. That neither the erection of the wharf nor its long use nor the erection of the elevator showed such a claim of enjoyment as of right as to satisfy the statute. 7. That in any event the claim was of an easement in gross and therefore invalid. 8. That the verdict should have been against the defendants, in any event, because they were not making use of the waters for the purpose of trade and commerce where they anchored the vessels upon the lot. 9. The patent to the City of Toronto of the water lots confirmed by the Esplanade legislation gave to the owners of water lots the right to fill in the lots and turn them into land.

COMMON PLEAS DIVISION.

Rose, J.]

[Jan. 15.]

REGINA V. YOUNG.

Brewers—Sale of liquors manufactured.

Held, that brewers licensed to manufacture under a Dominion license are licensed to sell by wholesale the liquor manufactured by them in places other than that named in the license.

Cattanach, for the motion.*Delamere*, contra.

Divisional Court.]

[Jan. 3, Feb. 3.]

STUART V. McKIM.

Garnishment—Money in hands of Speaker—Form of issue.

The defendant, a member of the Legislative Assembly, received a sum of money from a person as an inducement or bribe to influence him in his course in the Assembly, which he handed to the Hon. Charles Clarke, the Speaker of the Assembly, to await the action of the Assembly with regard to the alleged bribery. The plaintiff, a judgment creditor of the defendant, issued an attaching order attaching all debts due from, or accruing due from the said Clarke to the defendant, claiming that the money so handed to him became a debt payable to the defendant.

[January 3.]

The Court (GALT, J. dissenting), without expressing any opinion on its merits, directed an

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issue to be tried under Rule 370 O. J. A. as to the garnishee's indebtedness.

Walker (of Hamilton), for the plaintiff.

J. G. Scott, Q.C., for the garnishee.

The form of the issue was subsequently settled by the Registrar, namely, whether at the date of the service upon the garnishee of the attaching order there was any debt due, or accruing due, from the garnishee to the defendant.

[February 3.]

An appeal to the Divisional Court by the garnishee to change form of issue was dismissed, the Court holding that the issue, as settled by the Registrar, was sufficient.

J. G. Scott, Q.C., for the appeal.

Clement, contra.

Rose, J.]

[Feb. 12.]

REGINA V. HOLLISTER.

Market by-law—Conviction under—Costs.

A by-law required "all hay, straw, grain, coal, farm produce and animals sold at the market or elsewhere in the town of Cornwall which is required to be weighed by the vendor or purchaser to be weighed by public weigh scales." A conviction under this by-law was that the defendant "brought into the town of Cornwall" certain hay, etc., "and had the same weighed on scales other than the public scales of said town, the same being a contravention of the market by-law and amendments thereto of said town."

Held, that the conviction was bad in not stating that the hay was "sold at the market or elsewhere," and must therefore be quashed.

As the complainant was the weighmaster, and had instituted the prosecution for his own benefit after warning, instead of bringing an action in the Division Court he was ordered to pay the costs.

Aylesworth, for the applicant.

Cattanach, contra.

Rose, J.]

[Feb. 17.]

MACFIE V. PEARSON.

Attachment under Absconding Debtors' Act—Creditors' Relief Act.

On 27th September, 1884, the sheriff seized certain goods of the defendant under two writs of execution. On the 30th a writ of attach-

ment against defendant as an absconding debtor was issued and placed in his hands under which he seized all the defendant's property, credits and effects. On 1st and 2nd October two more writs of attachment were placed in his hands. On 13th October the sheriff sold under the two executions and realized enough to satisfy them, which moneys remain in his hands pending these proceedings. On 20th October the sheriff received a certificate issued under and pursuant to the Creditors' Relief Act, 1880, and on the 24th of same month received a further certificate under the said Act. On 26th he sold the balance of defendant's property, etc., so seized by him, and realized the sum of \$2,908.37 for, as he said, distribution amongst the creditors. After this, various executions and certificates were received by him. On the 14th October the sheriff, pursuant to the Creditor's Relief Act, made the entry in his book. The attaching creditors had not placed executions in the sheriff's hands.

Held, that the proceedings under the Absconding Debtors' Act were entitled to prevail as against those under the Creditors' Relief Act; and that the creditors who had certificates under the Creditors' Relief Act should obtain judgment and execution in the ordinary way so as to come within the provisions of the Absconding Debtors' Act.

Street, Q.C., *H. J. Scott, Q.C.*, *Gibbons, Clements, Shepley* and *Henderson*, represented the various parties.

Divisional Court.]

[Feb. 28.]

CLARKE V. RAMA TIMBER AND TRANSPORT COMPANY.

Canal—Dam—Damages by water overflowing plaintiff's land—Findings—New trial.

The defendants built a canal from a point on the St. John River to Lake St. John, and from thence to Lake Couchiching, under power conferred therefor by their act of incorporation, 31 Vict. ch. 66. The plaintiffs owning land near Lake St. John brought an action against defendants, claiming: (1) That by the erection or continuance of a dam by defendants in the bed of the St. John River, which was the natural outlet of the said Lake St. John, the waters of said lake were prevented

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from flowing by and away from his land, and also in not keeping the said dam in repair, whereby the plaintiff suffered damage; (2) That by the erection of the canal so built by them waters, that would not otherwise have done so, flowed into Lake St. John and damaged the plaintiff's land. At the trial a verdict was given for the plaintiff.

On motion to the Divisional Court, the Court, after discussing the evidence and liability of the defendants, were of opinion that in order to arrive at a conclusion as to the liability, if any, of the defendants, there should have been a finding as to whether the damage claimed was caused by the dam or the canal; and, if by the latter, whether by any negligence of defendants or by a *vis major*. A new trial was therefore directed.

J. K. Kerr, Q.C., for the plaintiff.

McCarthy, Q.C., and *F. Arnoldi*, for the defendants.

Divisional Court.]

[Feb. 28.]

COPELAND V. CORPORATION OF BLENHEIM.

Municipal corporations—Ways—Negligence—Contributory negligence.

A building was being erected on a street in the Village of Blenheim. It had a basement several feet deep; the joists of the first floor being about level with the sidewalk. For the purpose of excavating the basement, planks to the distance of twenty feet had been removed from the sidewalk and the earth taken away so as to form a grade into the basement. There were three openings in the basement wall, one in the centre for a door, and one on each side for windows. Where the doorway was there was a hole made by the grade into the cellar. Planks were laid across the open space in the sidewalk. During the day time a plank was laid from the board across the sidewalk to the first floor which it was customary to remove at night, and there was no direct evidence that it was not removed the night in question. The plaintiff, who knew of the dangerous character of the place, was, on the night in question, about 7 o'clock, going along the sidewalk, and while in front of the building met two persons and in endeavouring to get out of their way he struck against something and fell into the hole and was injured.

Held, that the defendants were guilty of negligence in leaving the hole unguarded; and that there was no evidence of contributory negligence on plaintiff's part.

Pegley, for the plaintiff.

Meredith, Q.C., for the defendants.

Divisional Court.]

[Feb. 28.]

LEADLEY V. McLAREN.

Sale of goods—Statute of Frauds—Acceptance.

Action to recover the purchase money of a large quantity of wool, namely, 39,538 lbs. of white wool at 24 cents per pound, and 11,652 of black wool at 21½ cents per pound under an alleged contract.

Held, CAMERON, C. J., dissenting, on the evidence disclosed in the case, there was no contract within the Statute of Frauds so as to bind the defendant; nor any acceptance to take the case out of the statute: that as to the black wool the contract was only for some ten sacks, and that although plaintiff spoke of being able to procure for defendants the larger quantity no contract was ever entered into for it; and as to the white wool, that though defendant had on different occasions received some ten and twenty sacks respectively of it, it was only for the purpose of testing the quality of the wool and not as an acceptance under the contract.

Held, therefore, the plaintiff could not recover.

McMichael, Q.C., for the plaintiff.

McLaren, for the defendant.

Divisional Court.]

[Feb. 28.]

GALBRAITH V. IRVING.

Solicitor and client—Security for costs incurred—Misdirection—Adding parties—Assignment of reversion or future rent—Chose in action.

The defendant was lessee of certain premises from D. An instrument was signed by D. but not executed under seal, stating that in consideration of certain costs owing by him to plaintiff in certain cases named and other matters and cases, "I hereby assign and transfer unto the said G. H. Galbraith" (the plaintiff) "a certain lease dated," etc., "and made between John Irving" (the defendant) "to me,

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conveying the premises known," etc., "together with all rent now due, or to accrue due, from the said John Irving or his assigns in respect of said lease and the term thereby created." The plaintiff brought an action on this instrument to recover rent which accrued due after the making thereof. At the trial the learned judge charged the jury that while the plaintiff remained solicitor for D. he could not take any security for his benefit; and that he should have first dis severed the connection between them, and let D. have independent legal advice. *Held*, misdirection.

Held, also, that D. was not a necessary party, for if such a state of facts existed as would constitute fraud it might be raised without D. being a party; nor even if defendant desired to obtain relief over against D., for plaintiff had nothing to do with this, for she would only be so added to protect both parties.

A new trial was granted, unless the plaintiff desired the Court to consider matters not raised on the argument, namely, whether the assignment was of the reversion or of future rent issuing out of the land, and therefore void as not being under seal; or whether it could be supported as an assignment of a chose in action, namely, of the moneys payable under and by virtue of the covenants of the lease.

The plaintiff in person.

E. Meyers, of Orangeville, contra.

Divisional Court.]

[Feb. 28.]

MCCRAE v. BACKER.

Sale of land—Title of land—Condition precedent to payment of purchase money—Costs—Damages.

On 2nd May, 1882, the plaintiff agreed to sell and the defendant to buy certain land for \$856, namely, \$156 on the execution of the agreement, and the balance, \$700, without interest, on 1st January, 1883; and defendant covenanted to pay said sums as aforesaid. In consideration whereof the plaintiff covenanted to convey, or cause to be conveyed, the land to defendant free from incumbrances, and to permit defendant to occupy same until default. The agreement also provided that defendant might assume possession of the land and collect the rent then due from M., the tenant, and make arrangements with him for giving up possession. The defendant took possession

when he was turned out by M., who claimed the land and had registered a *lis pendens* against it. Ejectment was then brought and judgment recovered against M., when his solicitors undertook to remove and did remove the *lis pendens*, the defendant having been kept out of possession for a year. In an action by plaintiff against defendant for the purchase money the defendant set up as a defence that on 1st January, 1883, plaintiff could not give an unincumbered title to land by reason of the *lis pendens*; and also counterclaimed, contending for the costs of the ejectment suit, and for damages for being kept out of possession.

Held, by CAMERON, C. J., following *McDonald v. Murray*, that the shewing a good title by plaintiff was not a condition precedent to his right to recover the purchase money, and by ROSE, J., apart from this the plaintiff was entitled to recover; that defendant could have no claim for the costs unless there was an unqualified agreement to pay them; but, as it appeared, plaintiff, on his own statement, intended to pay some portion he was charged with half; and plaintiff was disallowed interest for the time defendant was kept out of possession.

Divisional Court.]

[Feb. 28.]

BOULTBEE v. BURK.

Statute of Limitations—Part payment.

The mere fact of part payment is not sufficient to take a debt out of the Statute of Limitations. It must be such that a jury may fairly infer a promise to pay the remainder.

In this case where payments were made there was evidence upon which such inference could be made, and the learned judge who tried the case having found that there was a promise to pay the remainder, the Court refused to interfere.

H. J. Scott, Q.C., for the plaintiff.

Tilt, Q.C., for the defendant.

Divisional Court.]

[Feb. 28.]

ADAIR v. WADE.

Seduction—Assessment of damages by judge without jury, Validity of—Service of writ of summons—Evidence of—New trial.

In an action for seduction no appearance was entered. The plaintiff then filed a state-

Com. Pleas.]

NOTES OF CANADIAN CASES.

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ment of claim to which no statement of defence was entered, and interlocutory judgment was signed and notice of assessment of damages given. When the case came on at the trial the defendant did not appear, and a jury was called, but on their disagreeing the learned judge discharged them and tried the case himself without a jury upon a fresh taking of evidence, and assessed the damages and gave judgment for the plaintiff.

Quære, whether under O. J. Act and former practice the learned judge had power to try the action and give judgment therein; but that it was not necessary to decide this point because it was not satisfactorily established that the writ of summons had been served on the defendant. The defendant was therefore allowed to file a statement of defence and a new trial directed; the judgment and execution to stand in the meantime as security.

J. K. Kerr, Q.C., for the motion.
Aylesworth, contra.

Divisional Court.]

[Feb. 28.]

BURNETT V. HOPE ET AL.

Partnership—Death of partner—Contract of hiring.

When a contract of hiring is entered into between a person and a firm, and afterwards one of the partners dies, the death of such partner puts an end to the contract.

Meyer, of Orangeville, for the plaintiff.

Moss, Q.C., and *Crerar*, for the defendant.

Divisional Court.]

[Feb. 28.]

THE ROYAL INSURANCE CO. V. BYERS.

Insurance—Fraud and misrepresentation—Right to recover back money paid.

Action to recover money paid by the plaintiffs to the defendant in settlement of a claim under a policy of insurance, the plaintiffs alleging that they had been induced to make the payment by the fraud and misrepresentation of the defendant.

Held, that the evidence failed to shew any fraud or misrepresentation; and if there were any it was immaterial; and further, the plaintiffs never offered to, and possibly could not, place defendant in his original position; and

that no amendment of the form of action could be made which could avail the plaintiffs.

Held, therefore, there could be no recovery.

Moss, Q.C., and *Clute*, for the plaintiffs.

Britton, Q.C., and *Dixon*, Q.C., for the defendant.

Divisional Court.]

[Feb. 28.]

RE DE SOUZA.

English Barrister—Right to practice in Ontario—Admission through Law Society.

Held, that to entitle an English barrister to practise at the Bar of Her Majesty's Courts in this Province he must be admitted to do so through the Law Society of the Province.

The applicant in person.

C. Robinson, Q.C. and *Walter Read*, contra.

Divisional Court.]

Feb. 28.]

WEBSTER V. HAGGART.

Arbitration—Consent reference—Right to appeal.

At the trial of an action it was referred, the order of reference being "upon the consent of the parties, I do order and direct that the matters in dispute between the plaintiff and defendant, upon the issues joined in this action be referred," etc. It was urged that as the action involved the investigation of long accounts, and was, therefore, such an action as would be referred compulsorily, the consent must be taken to be to the arbitrator named and not generally to the reference, and that there was, therefore, a right to appeal from the award on the merits,

Held, that the reference was a consent reference, and there was no appeal.

Osler, Q.C. and *Justin*, for the motion.

Milligan (of Brampton), contra.

Divisional Court.]

[March 7.]

DONOVAN V. HERBERT.

Ejectment—Insolvent Act 1870, sec. 68—Proceedings under—Validity—Possession—Damages.

In ejectment plaintiff claimed title under a deed from the assignee in insolvency of one D. It appeared that prior to the issue of the writ of attachment in insolvency D. had conveyed

Com. Pleas.]

NOTES OF CANADIAN CASES.

[Com. Pleas.]

the property to his brother. Two of the creditors claimed that this deed was fraudulent, and made a demand, under sec. 68 of the Insolvent Act of 1875, on the assignee to take proceedings to have the deed set aside which the assignee, on instructions from the other creditors, refused to do, and thereupon these two creditors obtained an order from the County Judge authorizing them to take proceedings, on their own behalf in the name of the assignee; such proceedings under the said section to be for their own benefit. Proceedings were thereupon taken by these creditors and the deed set aside and the land recovered back and was sold, and upon an order obtained from the County Judge a conveyance was made by the assignee to the purchaser, under whom the plaintiff claims. The defendant contended that this deed was void under sec. 75 because it was not authorized by the creditors at their first meeting or any subsequent meeting specially called for the purpose or by the inspector.

Held, ROSE, J. dissenting, that the deed was valid; that it depended entirely on the provisions of sec. 69, and was in no way affected by sec. 75; and, therefore, the sanction of the creditors was not essential to its validity; but at any rate the defendant, a mere stranger to the insolvency proceedings, could not avail himself of the objection.

The defendant set up a possessory title, but the Court *held* that the evidence failed to establish it; and also that damages awarded the plaintiff for mesne profits were not excessive.

McMichael, Q.C., for the plaintiff.

McCarthy, Q.C. and *Nesbitt*, for the defendant.

BROWN V. HOWLAND.

Promissory note—Made by secretary of Company—Individual liability—Completed instrument—Election to look to company for payment.

The Toronto Wheel and Waggon Company being indebted to plaintiff he got a note therefor signed by the defendant, who was secretary of the company, with, as defendant alleged, "per" before his signature, the intention being to fill in the company's name above defendant's, which had not been done. After the note became due, the plaintiff proved on the note

against the company who had gone into insolvency and obtained a dividend. The plaintiff subsequently sued defendant.

Held, that defendant was not liable.

Per CAMERON, C.J., that defendant must be treated as maker of the note, and would have been liable thereon, and, if material, it could not be said that the word "per" was before his name for what was alleged to be such might equally well be a flourish of the first initial letter of his name, but for his election to look to the company for payment by proving against them and accepting a dividend.

Per OSLER, J.A. The instrument never became perfected as a note, it being intended that the name of the company should have been filled in.

Held, also that the requirement of sec. 79 of the Canada Joint Stock Act, 1877, requiring the name of the company to be mentioned in legible letters with the word limited, did not apply here as this did not purport to be signed by or on behalf of the company.

McLean, for the plaintiff.

Arnoldi, for the defendant.

CLENDENNING V. TURNER.

Wharf—Tolls—Damages—Navigable waters.

The defendant built a wharf on the waters of Toronto Bay adjacent to the Island near Hanlan's Point under permission from the Commissioner of Crown Lands for the Province of Ontario. It was claimed, however, that the water lots in front of the Island, or at all events, the free access to and from the shore over the waters of the Bay was vested in the City of Toronto by grant from the Crown prior to Confederation. The defendant claimed to exact tolls from plaintiff for using the wharf, and also for damage done to the wharf by the negligence and want of care in management of his boat.

Held, that it was not necessary to decide as to the ownership of the soil under the water in question; that the relationship and dealings of the parties as disclosed by the evidence showed that no tolls were to be charged; that the wharf was constructed on the navigable waters of the Bay, and assuming that the Commissioner of Crown Lands had power to grant the license it did not give power to

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[Prac.]

charge tolls for vessels landing passengers at it, for the public had the right to reach the shore of the Island over the waters of the Bay; and the plaintiff having been invited by the proprietor of Hanlan's Point, the lessee of the corporation, to land passengers there, he had the right to land upon the wharf which prevented his reaching the shore at that place.

Held, however, that the defendant was entitled to recover the damages claimed for plaintiff's negligence as plaintiff was not at liberty either negligently or wilfully to use or exercise his rights so as to injure the defendant's wharf.

Allan Cassels, for the plaintiff.

W. Laidlaw, contra.

PRACTICE.

Boyd, C.]

[January 19.]

THOMSON V. FAIRBAIRN.

Administration suit—Reference—Change of place of—Conduct of.

An appeal from the order of the Master in Chambers changing the place of reference in an administration suit from Brantford to Walkerton, and giving the conduct of reference to the defendants, the executors, instead of the plaintiffs, was dismissed with costs.

Held, that the reference in administration actions should *prima facie* be to the place where the person whose estate is to be administered resided. G. O. Chy. 638, governs the case, and the practice laid down in *Macara v. Gwyn*, 3 Gr. 310, is superseded.

During the argument before the Master, and on the appeal the solicitor for certain of the defendants other than the executors asked for the conduct of the reference in the event of its being taken from the plaintiffs.

Held, that the solicitor could not obtain the conduct of the reference unless by a substantive application.

The appeal was dismissed without prejudice to a substantive application.

W. H. C. Kerr, for the plaintiffs.

Hoyles, for the defendants, the executors and the churches.

Holman, for the defendants, the village of Teeswater.

George Kerr, for the other defendants.

Rose, J.]

[January 27.]

CLENDENNAN V. GRANT.

Judgment—Rule 324 O. J. A.—Covenants—Unascertained amount.

Leave was given to plaintiff to sign judgment under Rule 324 O. J. A., where the claim was on a covenant by defendant with plaintiff to pay certain mortgages made by plaintiff on lands sold by him to defendant and for indemnity, and where the plaintiff was being sued for payment of four of the mortgages, but had not actually paid them in whole or in part; the judgment to be for the amount of the four mortgages with interest, to be ascertained by the Registrar, and costs; the defendant to be at liberty to apply to be relieved from this judgment on his satisfying the holder of the mortgages, so that the action against the plaintiff is withdrawn and his costs paid.

J. B. O'Brian, for the plaintiff.

A. H. Meyers, for the defendant.

Mr. Dalton, Q.C.]

[Feb. 4.]

ROBERTSON V. COWAN.

Security for costs.

A defendant is entitled to security for costs from a plaintiff whose permanent residence is foreign, if at the time the application is made the plaintiff is actually out of the jurisdiction. The only answer to the application in such a case is the plaintiff's return within the jurisdiction.

Clement, for the defendant.

Masters, for the plaintiff.

Rose, J.]

[March 3.]

ONTARIO BANK V. BURK ET AL.

Judgment—Rule 80 O. J. A.—Notice of protest—Address.

An action on a promissory note for \$15,000, dated at Prince Arthur's Landing, 15th Sept., 1884, payable one month after date at the Ontario Bank there, made by defendant M. Burk, payable to the order of the defendant C. C. Burk, and endorsed by C. C. Burk and the defendant D. F. Burk. The defendant C. C. Burk resided at Bowmanville and the other defendants at Prince Arthur's Landing.

Since the making of the note the place called Prince Arthur's Landing was incorpor-

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

ated under the name of Port Arthur, the limits of the two places not exactly corresponding. Prince Arthur's Landing was not an incorporated place, and the post office prior to the incorporation was called Thunder Bay.

A motion was made by the plaintiffs before the Master in Chambers for judgment under Rule 80 O. J. A. against the defendants C. C. Burk and D. F. Burk, as endorser of the promissory note.

The sole defence suggested in answer to the application was want of notice of protest, the defendants C. C. and D. F. Burk being, as it was said, accommodation endorser. These defendants filed affidavits denying receipt of any notice of dishonour.

In the material filed by the plaintiffs on the application there was no allegation of notice of protest save that the plaintiffs claimed notarial charges. The protest was, however, subsequently produced in Chambers.

The Master in Chambers expressing an opinion against the defendants on their affidavits, the defendants C. C. Burk obtained an enlargement to examine the notary and his clerk.

On the return of the enlarged motion, the depositions taken on the examination were produced, and it was shown by them that notice had been sent to the defendant C. C. Burk at Port Arthur, and on this a further point was raised, viz.: that the Stat. 37 Vict. (C.) c. 47, sec. 1, had not been complied with, the notice of protest not having been addressed either to the defendant's place of residence or to the place where the note was dated.

The Master in Chambers made the order asked, directing judgment under Rule 80, and the defendants C. C. Burk and D. F. Burk appealed to a Judge in Chambers.

Held, that as the protest was not originally part of the plaintiffs' material, therefore apart from the examination of the notary and his clerk there was no evidence of the defendants having received notice, and as there was a distinct denial by the defendants of having received notice, the motion should have been refused before the enlargement took place.

Held, also, that the fact of notice was one which the plaintiff should have proved, and the production of the protest, being only presumptive evidence of the posting of the notices, was not sufficient in the face of the denial of receipt of the notices.

Held, also, that the point raised on the

deposition of the notary and his clerk as to the sufficiency of a notice addressed to Port Arthur when the endorser resided at Bowmanville and the note was dated at Prince Arthur's Landing, was one open to argument upon which the defendant was entitled to have a trial, and on this ground judgment should not have been ordered.

Walter Barwick, for the plaintiffs.

Holman, for the defendant, C. C. Burk.

Mr. Macrae (R. S. Smellie), for the defendant, D. F. Burk.

The Master in Chambers.]

[March 4.

BRADLEY v. BRADLEY.

Alimony suit—Disbursements to be paid by defendant before trial—Counsel fee—Solicitor as Counsel.

On an application by the plaintiff in an alimony suit, for an order against the defendant for payment before the trial of *interim* disbursements, witness fees and counsel fee, *Shepley*, for the defendant, cited *Haffey v. Haffey* 7 P. R. 137.

Millar, for the plaintiff, cited the unreported case of *Ingram v. Ingram* and *Magurn v. Magurn*, 20 C. L. J. 261 and 4 C. L. T.

In *Ingram v. Ingram*, FERGUSON, J., affirmed an order of the Master in Chambers for payment to the plaintiff before the trial "on account of her disbursements for witness fees \$22.35, and on account of her disbursements for Counsel, \$40," but he thought the order might be varied by providing that the counsel fee should not be paid if the plaintiff's solicitor acted as Counsel.

In *Magurn v. Magurn*, OSLER, J. A., sitting as a Judge of the Court of Appeal in Chambers made an order for the defendant to pay to the plaintiff before the hearing of the appeal a sum of \$40 for the purpose of paying the wife's counsel fee, notwithstanding that it appeared that the counsel would be the solicitor for the plaintiff.

THE MASTER IN CHAMBERS followed *Ingram v. Ingram* and *Magurn v. Magurn* as to payment before the trial, and *Magurn v. Magurn* as to the payment of counsel fee when the solicitor was to act as Counsel, and ordered the defendant to pay plaintiff's witness fees, counsel fee and disbursements forthwith, the solicitor for the plaintiff to see to the proper expenditure of counsel and witness fees.

Prac.]

NOTES OF CANADIAN CASES.

[Prac]

Rose, J.]

[March 4.]

BUDWORTH V. BELL.

Security for costs—Penal action—Time for application for—What costs to be secured—C. L. P. Act sec. 71—Rule 429 O. J. A.

In a penal action brought by a common informer, the Master in Chambers made an order in general terms for security for costs under the 71st section of the C. L. P. Act.

The order was made after the statement of defence had been delivered, and after the parties had been examined.

Held, on appeal, following *Sydney v. Bird*, 23 Ch. D. 358, that the order was properly made at that late stage of the cause, and was authorized by Rule 429 O. J. A., but that the order should be amended so as to direct that security should be given "for the costs to be incurred in such suit or action," following the words of the 71st sec. of the C. L. P. A.

H. T. Beck, for the plaintiff.

McMichael, Hoskin and Ogden, for the defendant.

Rose, J.]

[February 24.]

[March 13.]

RYAN V. CANADA SOUTHERN RY. CO.

Local Judge of High Court—Jurisdiction—Rescinding orders.

The plaintiff's solicitors lived at Sandwich and the defendant's solicitors at Toronto.

The local judge at Sandwich in November, 1884, made an *ex parte* order for leave to the plaintiff to amend the writ of summons before service, and subsequently set aside his own order on the defendant's application on notice to the plaintiff, and after argument by Counsel on behalf of both parties.

The plaintiff appealed from the second order to a Judge in Chambers at Toronto.

Held, that the local judge had no power to make the rescinding order under Rule 422 O. J. A.

Subsequently the defendants made a substantive motion before the same Judge in Chambers at Toronto to set aside the original order of the local judge.

Held, that save as excepted, a local judge of the High Court in proceedings in the High Court having the same power in Chambers as a judge of the High Court in Chambers as to the matters referred to in the Judicature

Rules, he is a judge of co-ordinate jurisdiction with a judge of the High Court in Chambers. A judge of the High Court has, therefore, no power to review the decision of a local judge save by way of appeal in the manner provided by the Judicature Rules. This motion cannot be treated as an appeal as it is too late under Rule 427 O. J. A.

Aylesworth, for the plaintiff.

H. Symons, for defendants.

Rose, J.]

[March 13.]

GORING V. THE LONDON MUTUAL FIRE INSURANCE COMPANY.

Examination—Discovery—Officers of Corporation.

In an action upon a fire insurance policy against a company,

Held, that the local territorial agent of the company who received the application and the premium and issued the *interim* receipt, and his successor who had charge of the agency when the fire occurred were properly examinable for discovery, before the trial, as officers of the company under the C. L. P. Act.

Quare, whether the examination should not be limited to the purposes of discovery, and whether or not it should be used as evidence against the company.

Clement, for the plaintiff.

Aylesworth, for the defendants.

Rose, J.]

[March 13.]

HUGHSON & CO. V. GORDON.

Judgment—Rule 80 O. J. A.

In an action on a promissory note made by defendant in favour of one McKenzie, and by him endorsed to the plaintiff, the Master in Chambers made an order for judgment under Rule 80 O. J. A.

The usual affidavit was made by the plaintiffs' manager. The defendant filed an affidavit in answer showing that he was an accommodation maker and stating his information and belief that the plaintiffs were perfectly aware of the fact. He also stated on information and belief that the plaintiffs held the note as collateral security, and that they never gave any value for it, and further that since the making of the note McKenzie had become insolvent and had made an assignment for the benefit of his creditors, and that there was

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[Prac.]

litigation pending between the plaintiffs and his assignee in respect to certain securities alleged to be held by the plaintiff on account of McKenzie's indebtedness. An affidavit of the plaintiffs' manager in reply was filed denying knowledge of the note being an accommodation one, and stating that it was discounted by the plaintiffs and the proceeds placed to McKenzie's credit.

On appeal from the order of the Master in Chambers,

Held, that it is not the duty of the Judge in Chambers hearing an application under Rule 80, to determine how the facts are. This is not a case in which judgment can be ordered.

Aylesworth, for the appeal.

J. H. Mayne Campbell, contra.

Rose, J.]

[March 16.]

CULVERWELL V. BIRNEY.

Examination of defendant—Excluding co-defendant.

An appeal from the order of the Master in Chambers directing the defendant J. L. Birney to attend and be examined at his own expense after an abortive examination, and directing the defendants to pay the costs, was dismissed.

Held, that the special examiner was right in ruling that the defendant Joseph Birney should be excluded during the examination before him in the cause, of the other defendant J. L. Birney.

Fullerton, for the appeal.

Holman, contra.

Rose, J.]

[March 16.]

FLETCHER ET AL. V. FIELD.

Costs—Taxation—Special circumstances.

An appeal from the order of the Master in Chambers directing taxation of the plaintiff's bill of costs sued on in this action nearly two years after delivery was allowed.

The bill was for professional services rendered the defendant in an investigation of his conduct as a public official before a commissioner appointed by the Ontario Government, the plaintiffs acting as defendant's solicitors and also assisting as Counsel in the investigation, a senior counsel being also in attendance. The amount of the bill was \$593.42, the chief items being counsel fees. The solicitors who were acting against the defen-

dant, in the investigation, charged their clients \$740. The investigation lasted nine days. The bill was rendered in 1883.

The special circumstance relied upon to enable the defendant to obtain the order for taxation after the lapse of more than a year from the delivery of the bill was, in the words of the defendant, that "there was a distinct understanding between me and the above named plaintiffs that the payment of the said bill of costs was to lie over to await the decision of the Ontario Government, who were by both me and the said plaintiffs, as they stated, expected to pay said bill of costs, I being one of their officers and the charges against me having fallen through."

Held, that the existence of the above understanding, if proved, was not a special circumstance within R. S. O. c. 140, sec. 35, to justify an order for the taxation of the bill after the lapse of a year.

Aylesworth, for the appeal.

Watson, contra.

Rose, J.]

[March 16.]

SLATER V. PURVIS.

Changing place of trial.

A motion to change the place of trial in a County Court action from London to Toronto was refused under the following circumstances:

The action was on a promissory note made at Toronto, payable at Toronto. The plaintiff resided in Montreal, and his solicitor in London. The sole defence was that the defendant was discharged from liability by a discharge under the Insolvent Act. The defendant resided in Toronto, and swore that he intended to call two witnesses, the clerk of the County Court of Toronto, and the assignee of the defendant, who also lived in Toronto. The plaintiff filed no affidavit on the motion.

Morson, for the motion.

Aylesworth, contra.

Rose J.]

[March 16.]

COCHRANE V. MORRISON.

Trial of issue by county judge—Powers of judge—Rule 373, O. J. A.

Upon a garnishing application made after judgment in this action, which was brought in the H. C. J., C. P. D., the Master in Chambers made an order under Rule 373, O. J. A., direct-

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

ing an issue raised by one of the garnishees to be tried before the judge of the County Court of Wellington and a jury at the next sittings of the Court.

After this order was made the county judge assumed to make an order directing the defendant to produce, and the defendant failing to produce, a further order striking out his defence or denial of the issue, and declaring the plaintiff entitled to the moneys in question and to judgment. These orders were entitled "In the County Court of the County of Wellington."

Held, that the county judge had no power to make the order to produce or the subsequent order. The action was not by the order of the Master transferred to the County Court, but was still in the High Court of Justice.

H. J. Scott, Q.C., for defendants.

Black, for the plaintiff.

Boyd, C.]
Div. Ct., Chan. Div.]

[February 9.
[March 21.

RATTE v. BOOTH.

Parties—Joinder of.

The plaintiff, the owner of a water-lot abutting on the Ottawa River who carried on the business of letting boats for hire, brought an action against four saw-mill owners alleging that they, being each the owner of a saw-mill situated higher up on the river than the plaintiff's lot, had each been in the habit of throwing sawdust, slabs, etc., into the river, and that this waste matter floating down the river had lodged upon and in front of the plaintiff's water-lot, and had there formed into a solid mass.

Held, that the four saw-mill owners were properly joined as defendants in one action.

McCarthy, Q.C., *Gormully* and *Clement*, for the defendants.

MacLennan, Q.C., for the plaintiff.

Proudfoot, J.]
Div. Court.]

[January 2.
[March 21.

LAUDER v. CANIER.

Dower—Pleading—Rule 128, O. J. A.

The statement of claim in an action of dower stated that the plaintiff was the widow of L., who died seized of such an estate (in certain lands) as to entitle and give the plaintiff an estate of dower therein.

Held, that the pleadings in action of dower are to be governed by the provisions of the Judicature Act. The right of dower is a legal conclusion from certain facts, and these facts ought to be shortly stated in the pleading.

The statement of claim was held insufficient and was struck out, leave being given to amend.

S. H. Blake, Q.C., and *Grote*, for the plaintiff.

Langton and *Haverson*, for the defendants.

Ferguson J.]

[March 21.

KINCAID v. REED.

Receiver—Plaintiff—Estate under administration.

Watson, for the plaintiff, moved for an order appointing the plaintiff receiver of the share of the defendant (against whom judgment had been recovered in this action) of the estate of defendant's deceased father, in the hands of his administrator, to which defendant is entitled under the Statute of Distributions. He cited *Fuggle v. Bland*, 11 Q. B. D. 711; *Webb v. Stenton*, 11 Q. B. D. 518; *Westhead v. Riley*, 25 Chy. D. 413.

FERGUSON, J., made the order asked for, appointing the plaintiff receiver of the defendant's share to the extent of the judgment and costs, including the costs of this application. The plaintiff not to be required to give security and not to receive any remuneration. The plaintiff to pass his accounts as receiver, and to hold the money subject to further orders.

Rose, J.]

[March 23.

LOCOMOTIVE ENGINE CO. v. COPELAND.

Substitutional service—Local judge—Rule 422, O. J. A.

The action was begun in the High Court of Justice by writ issued out of the local office at Kingston.

Two of the defendants lived in Chicago, Illinois.

The local judge at Kingston made an order for substitutional service on these defendants by serving another person resident in this Province.

Held, that the local judge had no jurisdiction to make the order under the provisions of Rule 422, O. J. A.

Pattison, for the defendant.

D. Saunders, for the plaintiffs.

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DIARY FOR APRIL.

- 1. Sun.....2nd Sunday after Easter.
- 13. Thur.....St. George's Day.
- 14. Fri.....Lord Cathcart, Governor-General, 1846.
- 26. Sun.....3rd Sunday after Easter.
- 28. Tue.....Primary Examinations for Students-at-Law and Articled Clerks.
- 29. Wed.....Graduates seeking admission to Law Society to present papers.

TORONTO, APRIL 15, 1885.

WE are glad to learn that the Benchers have granted permission to the Osgoode Legal and Literary Society to hold their annual dinner on the 22nd inst. in the Convocation Hall. We have always considered that this Society deserved every possible encouragement, and are glad to see the powers that be are of the same opinion. The success of the dinner will no doubt be enhanced by the *genius loci*. That the coming members of the Bar should hold their celebration beneath the portraits of those who have been the leaders of their profession is eminently appropriate. It will give altogether a more professional character to the meeting. It will no doubt lead members of the Bench, as well as more members of the Bar, to attend these dinners, and we believe the Chancellor intends to set the example on the present occasion. Moreover, it is certainly a good thing to keep the youthful members of the Society within the precincts of the temple of Themis, rather than send them to the gilded saloons of Bacchus: by which, to descend to sober English and modern times, we mean that Convocation Hall is a better place for the dinner than the Walker House.

THE ADMINISTRATION OF JUSTICE ACT, 1885.

It has now become a recognized custom that every Session of the Ontario Legislature shall be marked by an Administration of Justice Act, a sort of omnibus-hodge-podge piece of legislation covering a multitude of diverse subjects, having no sort of connection with each other. An ancient precedent for this kind of statute is found, of course, in 12 Geo. II., c. 13, which was passed to regulate the price of bread, and for the better regulation of attorneys and solicitors. We venture, however, notwithstanding that ancient precedent, to doubt the propriety of this method of legislation.

The Administration of Justice Act, 1885, among other things, provides that when one of the present Judges of the Court of Appeal dies or retires, his place is not to be filled; but instead, an additional Judge is to be appointed for the Chancery Division. People who have to wait for dead men's shoes have a proverbially long time to wait; and, while we hope the learned Judges of the Chancery Division may not be worn out with their labours before the coming fourth man is added to their number, we equally hope long life and vigour to the Judges of Appeal.

After disposing of this little matter, the Act provides that declaratory judgments and orders may be pronounced, though no consequential relief is, or could be asked, which is a legislative reversal of the principle recently acted on by the Chancery Division in *Brookes v. Conley*, ante p. 36. Next we have a legislative reversal of the rule of law established by the House of

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Lords in the recent case of *Foakes v. Beer*, 9 App. Ca. 605, 51 L. T. N. S. 833; and a binding agreement, for the payment of part of a debt in satisfaction of the whole, may now be made without its additional "canary bird, or tomtit, or other rub-bish," as Sir George Jessel scornfully termed those "valuable considerations," which *Foakes v. Beer* solemnly determined were necessary to be given in order to make such a bargain good in law.

Then sections 33, 34 and 43 of the Judicature Act, 1881, are restricted to actions only. After this, the subject of indemnity to defendants in replevin actions is taken up, with a view to altering the law as recently laid down in *Williams v. Crow*, 10 App. R. 301, so far as actions of replevin are concerned, which do not arise out of distress for rent, or damage-feasant. Then, for a little diversion, the Queen's Printers' copies of statutes and orders in Council, both Provincial and Dominion, are made *prima facie* evidence.

The High Court is then invested with power to appoint administrators, or administrators *ad litem* with, or without security. This is an extension of the jurisdiction of the High Court. Formerly, it had no power to appoint a personal representative; but it had power to appoint a person to represent the personal estate of a deceased, where no personal representative had been appointed. Persons thus empowered to represent an estate, were often erroneously designated administrators *ad litem*, which of course they were not, as the Surrogate Court alone had jurisdiction to appoint administrators. The Act then goes on to enable the Court to grant a judgment for the general administration of an estate as against an executor *de son tort*, without joining a duly-appointed executor, or administrator.

The jurisdiction of the Master in Chambers is extended to all acts now done by

a Judge in Chambers, except the matters excepted by Rules S. C. 420 *a*, 424. The effect of this piece of legislation appears to be to take away from the learned Master in Chambers, the power to make orders for the payment of money out of Court which, under the recent Rule S. C. 548, had been conferred on him—the reason of which is to be found in the fact that, by a subsequent section of the same Act, each County Judge and Local Master is authorized in his respective County to exercise the same jurisdiction as the Master in Chambers, and we suppose that the allowing orders for payment of money out of Court to be made by all these officers, although it might lead to a decentralization of the moneys in Court, was thought not to be of so great a public convenience, as the possible inconveniences which might result from that course.

The result of giving the various local officers these enlarged powers we predict will lead to a great diversity of practice—possibly a different one for each county—together with increased work for the judges in the way of appeals. The various innocents who passed this measure, are, no doubt, of opinion they are making law cheaper. Doubtless, they are right too. It will prove cheap, but accompanied with many inconveniences which will in the end, we fear, prove excessively expensive. Formerly, you could go to Osgoode Hall and find the whole record of an equity suit, the decree and the various orders made in it. Now, unless one knows which of the forty offices an action is commenced in, one is pretty well in the position of "searching for a needle in a bundle of hay." In searching titles and other proceedings involving the necessity of examining the papers in any suit, the decentralization which is all the rage, will prove an endless nuisance and a costly luxury. We fear that too many of the lawyers in the House are actuated by

THE ADMINISTRATION OF JUSTICE ACT—OUR ENGLISH LETTER.

Boyle Roche's ideas, when he exclaimed, "What has posterity ever done for us?" We question the wisdom of this legislation.

To return to our *moutons*. Provision is made for additional Assizes in Middlesex and Hamilton, and such other places as the judges may appoint. Amendments are then made to the Jurors' Act of 1883. Then there is a clause enabling Courts of Record, and judges of Division Courts having cognizance of penal actions, to remit the penalties recovered in such actions wholly or in part, whether payable to the Crown, or an informer.

The next subject legislated upon is the Accountant of the Supreme Court, who is created a corporation sole; and the moneys now in the Court of Appeal, and hereafter to be paid into that Court, are to be placed under his control. The Accountant's office is therefore now constituted the sole office in which moneys are to be paid into, or out of Court, for both the Court of Appeal and the several Divisions of the High Court.

Having disposed of the Accountant, the extension of the jurisdiction of the County Judges and Local Masters to which we have referred is provided for, and then power to tax costs, including counsel fees, is given to Deputy Clerks of the Crown, Local Masters, and Local Registrars, in all cases begun or pending in their offices, subject only to appeal to a judge. Why Deputy Registrars are excluded from the category of officers entitled to tax does not appear, and we are equally in the dark whether it is intended to abolish revision in those cases where it is by the Judicature Rules made compulsory. Further provisions are then made respecting County Court appeals, in a way which seems to indicate that it is special legislation to meet some particular difficulty.

Powers are given to make Surrogate Court Rules, and to frame a tariff of fees for Courts of General Sessions of the

Peace and Surrogate Courts, which we trust may be exercised in a liberal spirit, and thus remedy a long standing grievance. The present tariff is an absurdity. Provision is then made for the appointment of official interpreters: and the next section enables the Court or Judge to exclude any creditor who refuses to join in contesting a claim under section 10 of the Interpleader Act from any benefit resulting from the contestation.

Then comes an increase of Sheriff's fees in criminal proceedings and a clause relating to gaols in Nipissing, and another enabling Stipendiary Magistrates in districts to act as coroners. Then comes a provision for affixing stamps on proceedings insufficiently stamped.

A growing tendency of some Judges to prolong the sittings of Court to unreasonable hours, gives rise to the next clause, which provides that when any such sittings are prolonged after eight p.m., an additional allowance to any officer paid by *per diem* allowance may be made upon the certificate of the presiding judge. We think it would have been far better to pass an act expressly prohibiting judges from sitting after six o'clock, p.m., or holding Court on any day appointed to be observed as a public holiday. The remaining sections apply to Justices of the Peace.

OUR ENGLISH LETTER.

(From our own Correspondent.)

UPON a very quiet time in the Courts has followed a chapter teeming with incidents of a more or less sensational character. First, came the great Durham Divorce case, then the horse-flesh libel case, and then the action between the pot and the kettle represented respectively by the editor and proprietor of *The World*, and the some-time editor of the *Whitehall Review*. The Durham divorce case,

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besides being tolerably scandalous in itself, was marked by a peculiar but somewhat interesting incident. A gentleman by the name of Stanburg, a law-student with a strong *penchant* for the Divorce Court, attempted one day to force his way into the Court while this great case was proceeding, and afterwards, by dint of making a detour through the back ways of the Court, actually did succeed in forcing his way in through the Judge's entrance and in making a flying leap from the bench into the well of the court. All this occurred during the adjournment for luncheon, and the offender found himself at Bow Street almost before the Judge had taken his seat. Upon the next day Sir James Hannen, naturally enough, received a letter from the irate student, and took the desired opportunity of hauling the officials over the coals. "Never" he said, "did I have any difficulty of this kind until I came to this building;" in addition, he clearly expressed his opinion that although Mr. Stanburg's actions had been indecorous, those of the door keepers had been illegal. In fact, there is no doubt that ever since the new Courts were opened there has been an unendurable infringement upon the public rights; the publicity of Courts of Justice has been forgotten; yet it is one of their first attributes. But the Durham case has other points of interest than this. Our public mind has been largely stirred by the argument and the judgment, and while the latter is confessed to be the only possible inference from the existing law, there is an universal consensus of opinion that the existing law is out of date. It is a monstrous thing that a man of large estate, naturally desirous of begetting an heir, should be tied up to a lunatic wife as long as Providence permits her to live; and there is doubtless much force in the suggestion that the law only permits this because in the eye of the law the prospect of the

procreation of lunatics is not intolerable.

The action against the editor of *The World* was brought by a person of the name of Legge who had at one time filled the honourable position of editor of the *Whitehall Review*. The case shows some features of special professional interest from the fact that certain curious facts of a highly unpleasant character were elicited by the cross-examination of the plaintiff. Society journalism deals largely with the Divorce Court, and it appears to have been the practice of Mr. Legge to bribe the solicitors' clerks with the view of obtaining the dates of citations, and of the hearing of petitions. Mr. Justice Hawkins spoke strongly upon this practice which has been unwontedly prominent of late. Long before the public ought to have known anything definite about the Garmoyle case the details of the pleadings had been published in almost every newspaper. It goes without saying that the betrayal and publication of matters of this kind is fatal to the confidence which men naturally feel that they are entitled to place in their professional advisers.

To proceed to more general topics, the Bar was undoubtedly disappointed at the unexpected stability of the Government; for now there appears to be every chance that there may be no change in the law-officers for another twelve-month. It appears also to be likely enough that no new Q.C.'s will be appointed in the interval. This is depressing, for the delay in promotion is causing a positive block at the outer Bar. On the other hand business is becoming more brisk, except in bankruptcy. At the Assizes, crimes are rare, except in the largest provincial towns, and this decrease of crime is traceable to something more than the extended jurisdiction of Sessions. In fact, education is bearing good fruit. But the tone of satisfaction adopted by Lord

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Coleridge, and the Duke of Westminster is undoubtedly a little premature. Depression of trade is almost always accompanied by slackness in the criminal industries; for almost all crimes, other than those of the habitual criminal are committed by men in a state of intoxication, and intoxication is the result of money. Now the poverty of the labouring classes at this present moment is deplorable, and it would be wise, before venturing to pronounce an opinion upon the morality and honesty of the community to wait for prosperous and free-handed times. This consideration is strongly forced upon me by the fact that crimes of educated men show no tendency to diminish, but rather a strong tendency to increase. Commercial business is reviving fast, and changing hands a little: of libel actions there is an unusually strong crop.

Since this letter was commenced, a somewhat peculiar proceeding has been taken in the Chancery Division. An attempt has been made to procure the committal of Mr. Hoare, the well-known banker, for holding prohibited communication with a young lady who was a ward of this court. The peculiarity of the proceeding consisted in the fact that the order was made during the infancy of the ward, but was said to extend to the period of her majority. Mr. Justice Chitty seemed to think, although he declined to commit, that the contention was correct in law. If so, the doctrine is new not only to the general public but to the mass of the legal profession, and it is open to question whether the powers of an Equity Judge acting "in personam" ought to be curtailed.

It has long been in my mind to say something of the nominal fusion of Law and Equity. The Judicature Acts have now been in force so long that the process of blending ought to be complete if it was ever possible. It amounts to nothing more than this, that an Equity doctrine is occa-

sionally brought forward in the Queen's Bench Division where it is considered with curious awe by Counsel and Judge; notwithstanding that it is always described as "well-known." Occasionally, too, a Judge of the Queen's Bench Division sits in the room of, or rather to assist, his brother of the Chancery side. Mr. Justice Field is doing so now to aid Mr. Justice Chitty, who, as a popular Judge and a courteous, has a list unduly full; and Mr. Justice Field usually says, by way of overture to the proceedings: "You will understand, of course, that I am perfectly ignorant of these matters." One symptom of the forensic manner of the age may perhaps be due to the fusion. Conversation has now taken the place of oratory, and disputatiousness has conquered argument. There is hardly a Judge on the Bench who will allow a man to state his contention in his own words without interruption by questions; yet the normal consequence of such interruption is waste of time and, upon the part of the advocate who often fails to state his real argument, of temper.

Temple, March 18.

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THE March numbers of the Law Reports comprise 14 Q. B. D., pp. 225-379, and 10 P. D., pp. 17-32, 28 Ch. D., pp. 183-332. 10 App. Cas. 1-143.

CARRIED—RAILWAY COMPANY—PASSENGERS' LUGGAGE—DELIVERY TO PASSENGER.

The first case in the Queen's Bench Division to which we propose to refer that of *Hodkinson v. The London and North-Western Railway* (14 Q. B. D., 228). This is a short case upon the question as to the liability of a railway company for a passenger's luggage which had been lost under the following circumstances:—The plaintiff arrived at a station with two

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boxes which were taken from the baggage van by the defendants' porter. The porter asked the plaintiff if he should engage a cab for her. In reply, she said she would walk, and leave her luggage at the station for a short time, and send for it. The porter said "All right; I'll put them on one side, and take care of them;" whereupon the plaintiff quitted the station, leaving her boxes in the custody of the porter. One of them was lost. The Court (Coleridge, C. J., and Cave, J.) were of opinion, that what passed when the boxes were taken from the luggage van, and placed at the plaintiff's disposal, put an end to the responsibility of the defendants, and that when she left them in the porter's custody, he had ceased to be the defendant's agent.

MURDER—KILLING HUMAN BEING UNDER PRESSURE OF HUNGER.

The next case that it is needful to mention in the March number of the Reports of the Q. B. Division is the *cause célèbre* case on criminal law of *The Queen v. Dudley* (14 Q. B. D., 273), in which Lord Coleridge, who delivered the judgment of the Court, after elaborately reviewing the authorities bearing on the subject, declared that the prisoners, who, in order to save themselves from death by starvation, had killed and eaten a companion who with themselves had been cast away at sea, were guilty of murder. The sentence of death passed on the prisoners was afterwards, as we know, commuted by the Crown to six months' imprisonment.

MARRIED WOMAN—TRESPASS TO SEPARATE PROPERTY.

The only other case in the March number of the Queen's Bench Division to be noted is one in which the somewhat notorious Mrs. Weldon figures as plaintiff, viz., *Weldon v. De Bathe* (14 Q. B. D., 339), and in which an important question touching the rights of married women in their separate property, under the Married Women's Property Acts, 1870 and 1872,

came up for consideration. The plaintiff was in sole occupation of a house bought by her out of her own earnings since the Married Women's Property Act, 1870, and on the 14th April, 1878, the defendant in collusion, as it was alleged, with the plaintiff's husband and other persons, entered the house and remained there ten minutes, and thereby caused the plaintiff disgrace, trouble and annoyance. To this statement of claim the defendant delivered an objection in the nature of a demurrer, which the Divisional Court allowed, and struck out the claim for trespass; but on appeal to the Court of Appeal this decision was reversed, and it was held by the latter Court that, under the Act of 1882, a married woman may maintain an action for trespass to her separate property without joining her husband, and that the leave and license of the husband would be no defence to such an action.

Lindley, L. J., however, observes: "this case does not raise the question as to whether a married lady, having a house settled to her separate use, can keep her husband out of it; nor the question whether, if he be living there, he can invite anybody to come and see him. . . . The question we have to consider is whether, when a married woman is in possession of a house settled upon her for her separate use, and is not living with her husband, he can authorize somebody to enter the house without her consent. In my opinion the husband can give no such authority. The right of possession of the property to which she is entitled to her separate use, is an exclusive right against her husband; and, whatever his rights are, he cannot authorize anybody to intrude on the possession of his wife's separate property."

EVIDENCE—ENGINEER'S LOG.

Passing by the case of *The Beeswing*, which we have already noted in the

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English Practice Cases, the only other case in the March number of the Probate Division necessary to be referred to is *The Earl of Dumfries* (10 P. D. 31), in which it was held that in an action for damages by collision, the engineer's log though inadmissible for, is nevertheless admissible against, the ship owner by whom the engineer was employed.

WARD OF COURT—REMOVAL FROM JURISDICTION.

The first case in the March number of the Chancery Division is that of *Re Callaghan, Elliott v. Lambert* (28 Ch. D. 186), in which the Court of Appeal overruled the decision of Kay, J., refusing an application of the guardian of a ward of Court to remove the ward beyond the jurisdiction. The ward was a young lady of about twenty, who was born in Jamaica, and her guardian was her mother, who desired to proceed to Jamaica which she regarded as her home. Upon the appeal the Judges had a personal interview with the guardian of the ward; and an uncle of the young lady, resident in England, submitting to be appointed a joint guardian of his niece, the Court thereupon authorized the ward to proceed to Jamaica with her mother.

Baggallay, L. J., said: Mr. Justice Kay seems to have thought that in no case will the Court allow its ward, especially a female ward, to be taken out of the jurisdiction unless it is shown to be necessary. We think there is not any absolute rule of that kind, and that all that we have to consider is whether it is established to our satisfaction to be for the benefit of the ward that the application should be granted," and Fry, L. J., remarked, "We have only to consider two points: first, what is for the interest of the young lady? secondly, what is the security which the Court has that any further order will be obeyed? . . . In the appointment of the guardian, resident in this country, the Court has the requisite security."

LEASE—MISTAKE—RECTIFICATION.

The case of *Faget v. Marshall* (28 Ch. D. 255) is one which very clearly illustrates the different nature of the relief which is granted in suits founded upon an alleged mistake in a deed, when the mistake is mutual, and when it is merely unilateral. In this case the Court found that there was no sufficient evidence of mutual mistake, and therefore refused a rectification of the instrument, but, holding that a unilateral mistake on the part of the plaintiff had been established, decreed a rescission of the lease in question with an option to the defendant to accept a rectification instead. The law on the subject was succinctly stated by Bacon, V.-C.: "If it is a case of common mistake—a common mistake as to one stipulation out of many provisions contained in a settlement, or any other deed, that upon proper evidence, may be rectified—the Court has power to rectify, and that power is very often exercised. The other class of cases is one which is called unilateral mistake, and then if the Court is satisfied that the true intention of one of the parties was to do one thing, and he by mistake has signed an agreement to do another, that agreement will not be enforced against him, but the parties will be restored to their original position, and the agreement will be treated as if it had never been entered into."

TRUSTEE—IMPROVIDENT INVESTMENT—LIABILITY FOR LOSS.

We now come to the case of *Fry v. Tapson* (28 Ch. D. 268), a decision of Kay, J., on the subject of the liability of trustees for improvident investments, which while recognizing the rule that trustees acting according to the ordinary course of business, and employing agents as prudent men of business do on their own behalf, are not liable for the default of the agent so employed, yet establishes the important limitation that the agent must not be

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employed out of the ordinary scope of his business. The loss in question was occasioned by the investment of £5,000 upon mortgage of freehold land valued at from £7,000 to £8,000. The trustees had not exercised their own judgment in the choice of a valuer, but accepted the suggestion of their solicitors, that a surveyor—who had introduced the loan, and was in fact the agent of the mortgagor with a pecuniary interest in the completion of the mortgage—should value the property for the mortgagees, and they acted on his report which proved to have been of an inflated character. Under these circumstances the trustees were held jointly and severally liable to replace the sum advanced with interest from the date of the loan.

VENDOR AND PURCHASER—STATUTE OF FRAUDS.

Passing over two or three cases which do not seem to require notice here, we come to a decision of North, J., upon that fruitful source of litigation, The Statute of Frauds, viz., *Studds v. Watson* (28 Ch. D. 305). The defendant verbally agreed with the plaintiff to sell him her shares in certain property for £200 and signed and gave him the following receipt: "Sept. 22 1882, Received of J. Studds £1 of my share in the Barrett's Grove property the sum of £200." No time was fixed for completion and no abstract was delivered, and on the 16th March, 1883, the agent of defendant wrote to the plaintiff: "Mr. Studds, Sir,—If the balance of £199 on account of the purchase of my share of the property be not paid on or before the 22nd inst. I shall consider the agreement (made 22nd Sept, 1882) not any longer binding." This letter was not complied with; but on the 5th April, 1883, plaintiff tendered the defendant the balance of the purchase money, and a conveyance of the property for her execution, but this was declined. The plaintiff thereupon

brought the action for specific performance, and the question was whether the receipt and letter could be read together, and whether they together constituted a sufficient memorandum, and it was held that the word "balance" in the latter sufficiently connected it with the receipt to enable the two to be read together, and that being read together, they were a sufficient memorandum, and further that even if the word "balance" was not sufficient to connect the two documents, yet as they both referred to the same parcel agreement, all the terms of which were contained in one or other of them, they could be read together even though they contained no reference to each other.

VENDOR AND PURCHASER—MISREPRESENTATION—RESCISSION.

In the case of *Brewer v. Brown* (28 Ch. D. 306), which follows, we have another decision on the law of vendor and purchaser, in which the danger of a vendor making misrepresentations as to the character of the property offered for sale is again illustrated. The property purchased was a villa residence, and the misrepresentation consisted in the statement that the garden was "enclosed by a rustic wall with tradesmen's side entrance." The wall, in fact, did not form part of the property. This was known to the vendor, but not disclosed to the purchaser. The conditions provided that mistakes and errors in the description of particulars should not annul the sale, but that compensation should be given. The plaintiff, who was purchaser, paid £200 and took possession in May, 1880. In October, 1883, before conveyance or payment of the balance of the purchase money, he discovered that the wall, and the site of it, belonged to the adjoining owner, and thereupon commenced this action to rescind the contract. It appeared that the wall in question divided the premises from a road on which they abutted, and

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that a stone was let into the wall bearing the name of the villa which the plaintiff bought; the side entrance had been opened through the wall, but was enjoyed only by sufferance. The Judge found that the plaintiff had purchased believing, as he reasonably might, that the wall formed part of the property. Under these circumstances it was held by North, J., that the case was not one for compensation, but that the purchaser was entitled to have the contract rescinded. The ground of the decision was this: any one looking at the property might have come to the conclusion that the wall was part of the property, and that the purchaser would get it; it was therefore incumbent on the vendor in describing the property to take care that the persons who inspected it would know that the wall was not a thing to be sold.

ADMINISTRATION—INSUFFICIENT ESTATE—SOLICITOR'S LIEN.

The case of *Batten v. Wedgwood, Coal and Iron Company* (28 Ch. D. 317), to which we now come, does not seem to present any very novel features; but appears to us merely to affirm principles already well understood. The suit was brought by a debenture-holder of a company on behalf of himself and other debenture-holders to enforce a trust for the payment of the debenture. A receiver and manager was appointed who carried on the business of the defendant company for some years at a loss. The original plaintiff became bankrupt, and another debenture-holder was substituted as plaintiff, and the papers in the hands of the original plaintiff's solicitors were ordered to be delivered to the substituted plaintiff, without prejudice to their lien. After this the trust property was sold and the fund proved insufficient, and on the hearing of the action on further directions, it was held, that the fund should be applied: (1) in payment of the plaintiff's costs of realiz-

ing the property, including the costs of an abortive sale; (2) the balance due the receiver including his remuneration and costs; (3) the costs, charges and expenses of the trustees; (4) the two plaintiffs' costs of suit, *pari passu*. And it was held that the first plaintiff's solicitors had no lien on the documents delivered up by them, which could entitle them to priority in respect of their costs. Under Rule 1002, ss. 21 (similar in terms to the Ontario Rule 436), it was held that costs which a party is entitled to receive out of a fund may be set off against costs which he is ordered to pay personally.

INHERITANCE—DESCENT—TESTATOR DISPOSING OF LANDS NOT HIS OWN.

The only other case in the March number of the Chancery Division is that of *Re Douglas, Wood v. Douglas* (28 Ch. D. 327), which arises from that curious equity doctrine of election, which in effect enables a man by his will to dispose of estates which do not belong to him. A testator in 1852 died, devising as his own, an estate which had devolved on his late wife in fee, as heiress of her mother; the devise was to trustees to pay the rents to the testator's son and two daughters and the survivors or survivor of them, with remainder to the children of the son and daughters in fee, with an ultimate remainder to the testator's own heirs. The son and daughters survived the testator, but all died without issue. The son who survived the daughters died intestate, he was the heir, both of his father and mother. The testator had also devised real estate of his own to the son, who elected to confirm the will, but he never made, or was asked to make, any conveyance to the trustees of the land which descended to him as heir of his mother. It was held by Pearson, J., that the equitable estate which the son took under the will merged in the legal estate he took as heir of his mother, and that

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upon his death the descent was to be traced *ex parte materna*.

BRITISH NORTH AMERICA—LAW STAMPS—POWERS OF LOCAL LEGISLATURES.

The only case in the March number of the Appeal Cases which appears to have any special interest in this Province is that of *The Attorney-General for Quebec v. Reed* (10 App. Cas. 141), in which the validity of a statute of the Province of Quebec (43 & 44 Vict. c. 9), imposing a fee of ten cents upon every exhibit filed in Court, was called in question and held, by the Judicial Committee of the Privy Council, to be *ultra vires*. It was contended that the duty imposed was a direct tax in pursuance of s. 92, ss. 2, of the B. N. A. Act, 1867; but Lord Selborne, who delivered the judgment, after reviewing the opinions of various political economists, was of opinion that it must be considered to be an indirect tax. His lordship, while holding the particular tax to be invalid, nevertheless remarked that it was not necessary to determine whether—if a special fund had been created by a Provincial Act for the maintenance of the administration of justice in the Provincial Courts, raised for that purpose, appropriated to that purpose, and not available as general revenue for general Provincial purposes—in that case the limitation to direct taxation would still have been applicable. The result of the matter appears to be that Provincial Legislatures cannot validly impose taxes on legal proceedings, so as to raise a fund for the general purposes of the Province; yet it is possible they may validly impose such taxes provided they take care that they shall constitute a separate fund to be exclusively applied towards the maintenance of the administration of justice.

REPORTS.

CANADA.

ONTARIO.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

RE LEA AND THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Interest payable on award out of moneys paid into court.

Where money is paid into Court under sub-sec. 28 of sec. 9 Con. Ry. Act (Dom.) 1879, by a railway company as security for the compensation of land expropriated by them, pending an arbitration to ascertain such compensation; on such amount being ascertained, the owner is only entitled to the current rate of interest on the fund in Court, and not to legal interest.

[March 13.—Galt, J.]

The Ontario and Quebec Railway Company on 25th April, 1883, paid into the Canadian Bank of Commerce the sum of \$8,000 under the direction of the judge, pursuant to sub-section 28 of section 9 of the Consolidated Railway Act, 1879, as security for the lands of one John Lea, expropriated by them for the purposes of their railway, and thereupon obtained an order for immediate possession of the said lands. The money remained on a deposit receipt in the bank to the joint credit of the land owner and the company, bearing interest at 4 per cent. Subsequently, January 1st, 1884, the amount of compensation coming to the land owner was ascertained to be \$3,792 by arbitration under the provisions of the Act.

Afterwards, on March 13th, 1885, on motion by both parties for payment out, the question arose as to what rate of interest the land owner was entitled to.

Galt, J. (following *Great Western Railway Co. v. Jones*, and *Wilkins v. Geddes*, 3 S. C. 216), made an order for payment to both parties of their respective shares out of the \$8,000, with interest thereon at the rate of 4 per cent from date of the taking of possession of the land by the company.

Shepley, for the land owner.

MacMurchy (Wells & Co.), for the company.

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ENGLAND.

RECENT ENGLISH PRACTICE CASES.

HOLGATE V. SHUTT.

Order for account—Right to set up, and impeach—Settled accounts.

Where an order directing accounts was silent as to settled accounts, *held* the accounting party might nevertheless set up, and the opposite party impeach, settled accounts.

[28 Ch. D., 111.—C. A.]

On a motion for payment into Court and for a receiver coming before the Court, the parties agreed to an order for an account. The order made no reference to settled accounts. In taking the accounts a question arose whether settled accounts could be set up, and, if set up, whether they could be impeached.

FRY, L. J.—"It has been urged upon us that this inquiry is precluded by the form of the original order directing the account, for that if the plaintiffs desired to impeach the accounts they were bound to make a case for so doing at the hearing of the motion of the 14th December, 1883" (when the order for the account was made), "and ought at any rate to have obtained liberty to impeach settled accounts. In my judgment that argument comes too late, because the very point was decided by the Court when the case came before it in June last." (See 27 Ch. D., 111, 115.)

HURST V. HURST.

Administration action—Costs—Estate taken by heir in consequence of forfeiture under provisions of will.

Real estate descended to a testator's heir-at-law by reason of a forfeiture by the devisee under the provisions of the will, *held* not to be liable to pay the costs of an action to administer the testator's estate, in priority to specifically devised and bequeathed freehold and leasehold estate.

[28 Ch. D., 159.]

PEARSON, J.—"The forfeited interest is not absolutely and primarily liable to pay all the costs, but is liable only to pay such a proportion of the costs as it would have been liable to pay if it had remained in the son's possession as tenant for life under the will."

IN RE KLØBER.

KANNREUTHER V. GEISELBRECHT.

Administration—Foreign creditors.

In the administration of an English estate of a deceased person who in his lifetime was domiciled abroad, the foreign creditors are entitled to dividends *pari passu* with English creditors.

[28 Ch. D., 175.]

PEARSON, J.—"No one doubts that, according to the jurisdiction of the country where the assets are, the assets must be divided. . . . The law of England has always been that you must enforce claims in this country according to the practice and rules of our Courts; and, according to them, a creditor, whether from the farthest north or the farthest south, is entitled to be paid equally with other creditors in the same class. I must refuse to alter that which has always been the law of this country, and which I must say, for the sake of honesty, I hope will always be the law of this country."

SAUNDERS V. PAWLEY.

Notice of trial—Abridging time for plaintiff giving notice of trial.—Ord. 36, r. 12; Ord. 64, r. 7. (Ont. Rules, 255, 462.)

[14 Q. B. D., 234.]

The Court has no power under Ord. 64, r. 7 (Ont. Rule 462) to abridge the time allowed a plaintiff for giving notice of trial under Ord. 36, r. 12. (Ont. Rule 255.)

Note.—Under the English Rules the defendant cannot give notice of trial until the expiration of six weeks allowed to the plaintiff for giving the notice. Under Ont. Rule 255, either plaintiff or defendant may give notice of trial as soon as the cause is at issue.—See *McLean v. Thompson*, 19 C. L. J. 235; 9 P. R. 553.

FELLOWS V. THORNTON.

Attachment of debts.—Lapse of six years from recovery of judgment.—Ord. 42, rr. 6, 8, 22, 23. (Ont. rules 342, 355, 356.)—Ord. 45. (Ont. rule 370.)

[14 Q. B. D., 335.]

An order attaching debts may be made on the application of a judgment creditor, notwithstanding six years may have elapsed from the date of the recovery of his judgment, without execution having issued. Moneys actually in the hands of a trustee to which the judgment debtor is entitled may be

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attached, but not moneys to be paid to the trustee at a future time.

Note.—The Court, although agreeing that the attaching order might issue, differed on the question whether an attachment of debts could be regarded as an execution—Coleridge, C.J., holding that it was not an execution, and Stephen, J., holding that it was—but that the granting of the attaching order was equivalent to granting leave to issue execution within the meaning of Ord. 42.

EBRARD V. GASSIER.

Security for costs—One of several plaintiffs coming within jurisdiction—Appeal—Change of circumstances pending appeal.

[28 Ch. D., 232—C. A.]

In answer to an application for an order for security for costs, on the ground that the plaintiffs were resident out of the jurisdiction, an affidavit was filed to show that the plaintiffs had assets within the jurisdiction. This affidavit was considered insufficient, and the order was refused. From this order the defendants appealed. On the appeal an affidavit was produced on the part of the plaintiffs showing that, since the order, one of their number had come to reside within the jurisdiction for the purpose of carrying on the action.

Held, that though the affidavit as to assets within the jurisdiction was insufficient, yet the fact that one of the plaintiffs had come within the jurisdiction since the making of the order disentitled the defendants to security, and that the order must therefore be affirmed.

FOAKES V. WEBB.

Practice—Discovery—Privileged communication—Professional confidence.

[28 Ch. D., 287.]

A plaintiff interrogated a defendant as to whether interviews and correspondence had not, between certain dates, taken place between their respective solicitors, and also between the defendant's solicitor and a third person, in reference to the agreement which the action was brought to enforce.

The defendant refused to answer so far as the question related to communications between his solicitor and other persons, on the ground that he had no personal knowledge, and that the only information he had was derived from confidential communications between him and his solicitor in reference to his defence in the action.

Held, that the privilege from discovery resulting from professional confidence does not extend to facts communicated by the solicitor to the client which cannot be the subject of a confidential communication between them, even though such facts have relation to the case of the client in the action, and that therefore the defendant was bound to make a further answer.

KAY, J.—“The privilege of the solicitor is the privilege of the client; and how can there be a privilege as to a fact which is so outside the relation between them that it could not be the subject of a confidential communication? . . . Here the question is, did the defendant's solicitor communicate with the other side. As the solicitor never could protect himself from answering that question if he were in the witness box, it seems to me impossible to say that his client could refuse to answer an interrogatory as to that external fact on the ground it is privileged.”

BLACKIE V. OSMASTON.

Particulars of demand.

The plaintiffs by their statement of claims alleged that they and their testator had paid sums of money under a contract of suretyship, under which the defendant was also liable, and that, after deducting contributions received from other quarters, the balance paid by them was £16,233; and the plaintiff claimed the defendant was liable to pay them half of that sum.

Before putting in a defence the defendants applied for particulars of the £16,233.

Held, on appeal from Pearson, J., who had refused particulars, that as the plaintiff did not ask merely for an account, but claimed payment of a definite sum, they were bound to give particulars of demand.

[28 Ch. D., 119—C. A.]

BAGGALLAY, L. J.—“It is true it is not the practice of the Court to order the plaintiff to give particulars when he only asks a general account, but the rule is otherwise when he asks for payment of a definite sum.”

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NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**COURT OF APPEAL.**

HAMILTON PROV. L. CO. v. CAMPBELL.

*Interpleader—Ejectment—Right to growing crops
seized before judgment in ejectment.*The judgment of the Court below, 50 R. 371,
affirmed.

Muir, for appeal.

G. H. Watson, for respondent.

From Co. Ct., Wentworth.] [January 13.

PROCTOR v. MCKENZIE.*Ca. Sa.—Returnable after execution—Premature
return—Liability of bail.*Bail are not obliged to render their principal
before the return day of a *ca. sa.*Therefore, where a writ of *ca. sa.*, which
would remain in force for two months, was not
returnable on a day certain, but immediately
after execution, lay in the sheriff's hands from
the 16th July (the day of the *teste*) till the 21st
July, when it was returned *non est inventus*,*Held*, HAGARTY, C. J. O., dissenting (reversing
the judgment of the Court below), that the
bail were not fixed.*Held*, also, that the objection was not a
matter of practice only which should have
been taken advantage of by motion, but was a
matter of law to be taken advantage of by plea.

MacKelcan, Q.C., for the appellant.

W. F. Walker, for the respondent.

From Boyd, C.] [January 13.

VANKOUGHNET v. DENISON.*Sale of land—Restrictive covenant—Ambiguous
description—Parol evidence—Maps not referred
to in deed—Admissibility of.*D. sold to the predecessor in title of the
plaintiff certain land, and the deed containedthe following, which was held to amount to a
covenant, the benefit of which passed to the
plaintiff:—"Bellevue Square is private property,
but it is always to remain unbuilt upon,
except one residence with the necessary out-
buildings, including porter's lodge." The land
having been sold under mortgage a portion
came again to the hands of D. who proceeded
to convey parts of it for building purposes.*Held*, that parol evidence was admissible to
show what was meant by "Bellevue Square,"
no plan or description being incorporated in
the deed.*Held*, also, that the defendant's liability
under the restrictive agreement not to build
on Bellevue Square revived on his again ac-
quiring the property.Certain maps of the City of Toronto, made
by city surveyors in 1857 and 1858, showing
thereon a square marked "Bellevue Square,"
were offered in evidence to show the bound-
aries of the square. It was shown that the
defendant knew of these maps, but they were
not prepared under his instructions.*Held*, that the maps could not be received
in evidence to show the boundaries of the
square.*Per* HAGARTY, C. J. O.—The maps were ad-
missible to show that there was such a square
known as Bellevue Square, but not as evidence
of title or boundary.*Per* BURTON, PATTERSON AND OSLER, J.J.A.—
The maps were not admissible in evidence
without its being shown that they had been
prepared under the instructions of the defend-
ant, or on information given by him.The parol evidence showing that but a por-
tion of the land claimed by the plaintiff to be
the square was undoubtedly within the limits
of the square, the appeal was allowed as to all
but that portion.S. H. Blake, Q.C., and Black, for the appel-
lants.

MacLennan, Q.C., for the respondent.

ADAMSON v. YEAGER.*Principal and agent—Commission on sale—
Limitation of agency.*The defendant, at the instance of the plain-
tiff, placed his, the defendant's, farm in his
hands for sale, subject to the payment of a

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certain commission in case the farm should be disposed of through him, and if the defendant himself sold without the aid of the plaintiff, the commission should be only one-half. The defendant alleged that it was a term of the arrangement that if the land remained unsold at the end of two years the agreement should cease.

Held, that if parol evidence as to the limitation of time was not admissible, the law would infer its continuance for a reasonable time only; and that in deciding what was a reasonable time, the time spoken of by the parties, which was two years, might be considered.

Per BURTON, and PATTERSON, JJ. A., such parol evidence was admissible.

Held, also, that the defendant having refused to sell to a proposed purchaser found by the plaintiff, the plaintiff was not entitled to recover his full commission as on a sale, but the value of his services as on a *quantum merui* or damages for the defendant's wrongful refusal.

Ball, Q.C., for appeal.

G. T. Blackstock, contra.

HUNTER V. CARRICK.

Patent of invention—Infringement of patent—Want of novelty.

Held, reversing the judgment of Proudfoot, V. C., reported 28 Gr. 489, that the combination of the tilting grate and the feed door above the sole of the oven mentioned in the specification of the plaintiff as the first subject of claim for a patent, was so wanting in novelty as to render the patent obtained in respect, thereof, invalid. (PATTERSON, J.J.A., dissenting.)

McMichael, Q.C., for appeal,

Cassels, Q.C., contra.

PARKES V. ST. GEORGE.

Chattel mortgage—Consideration expressed—Future advances—Assignment for creditors—R. S. O. ch. 119—Simple contract creditor—Fraudulent assignment.

A judgment or execution creditor is entitled to impeach a chattel mortgage on the ground of an irregularity or informality in the execution of the document, or by reason of its

non-compliance with the provisions of the Chattel Mortgage Act (R. S. O. ch. 119); but a creditor who is not in a position to seize or lay on an execution on the property, cannot maintain an action to have the instrument declared invalid. A creditor in that position can only maintain such a proceeding where the security is impeached on the ground of fraud.

Q. and A. carrying on business as licensed victuallers were indebted to the defendant S., a wine merchant, to the amount of \$1,551.66; and being desirous of obtaining further advances to aid them in carrying on their business, applied to S. therefore, which S. agreed verbally to make upon receiving security for such advances as well as such prior indebtedness, and Q. and A. accordingly on the 24th of January, 1882, executed a mortgage to S. on all their stock-in-trade, securing \$2,400. S. agreeing to make the further advances in money and goods, as they should require them in the course of their business, and he did in fact between the date of the execution of the mortgage and the 3rd of March following, advance to them \$300 in money and goods, and the balance of the further advance was ready to be given to them at any time during that period. The affidavit of indebtedness in the sum of \$2,400 was in the usual form, and the mortgage was duly registered. On the last mentioned date, Q. and A. executed a deed of assignment for creditors to the defendant C. of all their estate, whereupon S., treating this assignment as a breach of the covenant against selling or parting with possession of the goods, seized them in the hands of the assignee and sold the same, undertaking to hold the proceeds subject to the order of the Court. Thereupon the plaintiff, a simple contract creditor of Q. and A., upon a demand due at the date of the mortgage, instituted proceedings seeking, on behalf of all the creditors of Q. and A., to have the mortgage declared void, and the amount realized on the sale of the goods paid to the assignee.

Held, that although the fact of the mortgage being expressed on the face of it to be made for a sum greatly in excess of what it was proved was due, was such an objection as rendered the security void under R. S. O. ch. 119, as against creditors, yet, it being clearly shewn that everything between the parties in

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connection therewith was done *bona fide*, and there being no creditor in a position to seize the goods if the mortgage were set aside, the plaintiff could not succeed, and the Court (PATTERSON, J. A., dissenting) reversed the judgment of the Court below (2 O. R. 342.)

Per PATTERSON, J. A., the mortgage and the affidavits accompanying it, though in their form and statements complying with all that is prescribed by the statute, being untrue in fact, rendered the security void.

Per BURTON, J. A.—Although no ground was shewn for impeaching the transaction as a fraudulent preference, the mortgage under the Chattel Mortgage Act, R. S. O. ch. 119, was invalid as against creditors who were in a position to attack it, which the plaintiff here was not, and as any informalities in the transaction were cured by the mortgagee having taken possession of the property, the plaintiff could not maintain the action.

Per OSLER, J. A.—The agreement between the mortgagors and mortgagee might be looked upon as having been really one for a present advance, though the amount was to be paid out to them as they required it. It was not necessary, therefore, that it should be set forth in the mortgage under sec. 6 of the Chattel Mortgage Act, R. S. O. ch. 119.

Barker v. Leeson, 1 O. R. 114, dissented from *per* BURTON, J. A.

Moss, Q.C., for appeal.

Cassels, Q.C., contra.

MAGURN V. MAGURN.

Alimony—Foreign Divorce—Fraud—Domicile.

In an action for alimony the defendant relied upon a divorce granted on his petition by the Circuit Court of St. Louis County, Missouri, where he then resided, the wife (the present plaintiff) having made no defence thereto, though notified of the proceedings. It appeared that the domicile of the husband at the time of the marriage and the divorce was Canadian, though the marriage was celebrated at Detroit, and the wife was an American citizen. It was proved that the evidence of desertion, as alleged by the husband, by the wife, and on which the decree of a divorce was founded, was untrue.

Held, that the decree, having been obtained on an untrue statement of facts, and for a cause not recognized by our law, could not be set up as a bar to the wife's claim for alimony.

Held, also, that the non-feasance of the wife in failing to appear or defend the action for divorce did not amount to collusion on her part, so as to estop her from impeaching the validity of the decree made in that action.

Held, also (affirming the decision of the Court of Appeal from, and following *Harvey v. Farnie*, L. R. 5 P. D. 153; 6 P. D. 35; 8 App. Cas. 43), that the jurisdiction to divorce depends upon the domicile of the parties, *i.e.*, of the husband, and that this being Canadian, the Missouri Court had no jurisdiction.

Per HAGARTY, C. J. O.—“There is no safe ground for distinction between domicile for succession, and for matrimonial purposes, or a domicile for residence.”

S. H. Blake, Q.C., and *Miller*, for the appeal.

MacLennan, Q.C., and *Biggar*, for the respondents.

COMMON PLEAS DIVISION.

Rose, J.]

[Feb.

HAMILTON, ETC., ROAD CO. V. BINCKLEY.

Road company—Power to exempt from payment of tolls—Ultra vires—Lapse of time.

By agreement made in the year 1869 between a road company and the city of Hamilton, the road company were to extend their road from a point near the Desjardins Canal into the limits of the city, and, as part of such road, should build a bridge over the canal, the city to lend the road company \$5,000 for ten years, at the nominal rate of interest of one per cent.; and a by-law was passed by the city to give effect to the agreement, the by-law containing a proviso that no toll should be exacted from any parties residing on, or owning property within the limits of the city on passing over said bridge. In this year litigation arose between the road company and the city, the Great Western Railway Company and the Desjardins Canal Company, as to the erection of the bridge, which was continued until 1874, when a settlement was effected by its being agreed by all parties interested that a fixed, stationary bridge should be erected and

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maintained by the road company, free from any toll thereon, which was legalized by the Act 27 Vict. ch. 73, O. The defendant objected that the proviso in the by-law as to not exacting tolls from residents of Hamilton was *ultra vires*, being unreasonable, unjust and discriminating in favour of a class; and that the by-law was bad for uncertainty, the location of the road not having been made prior to the passing of the by-law.

Held, that the company could agree not to charge toll to any person or body of persons, unless there was something in the act of incorporation, which there was not here, which prevented them doing so: that the city of Hamilton had paid a substantial sum for the privilege, and there was no discrimination as regards the residents thereof: that the proviso only applied as to not exacting tolls on the bridge, and had nothing to do with the road, and was legalized by 37 Vict. ch. 73, O.

Held, also, that the objection as to the location was not tenable after the road had been located and in use for some fifteen years.

Lash, Q.C., for plaintiffs.

Sadlier, for defendant.

Rose, J.]

[March 11.]

BEASLEY V. CORPORATION OF HAMILTON.

Accident—Negligence of municipal corporation—Statement of defence—Sufficiency of—Notice.

Statement of claim for damages for an accident to the plaintiff by his stepping upon the covering or lid of a manhole on the sidewalk which was alleged to be defective, loose and out of repair through defendants' default and negligence. By the first paragraph of the statement of defence the defendants denied the correctness of the statement contained in the plaintiff's statement of claim; and by the second paragraph set up that the defendants had no notice or knowledge that the covering or lid was defective, loose, or out of repair.

Held, on demurrer to the second paragraph of statement of defence, that the whole statement of defence must be read together, and that the second paragraph, taken with the first, either constituted a good defence or was immaterial: that it certainly could not embarrass the plaintiff, for if he proved actionable

negligence, he must prove either actual or presumptive notice. The demurrer was therefore over-ruled.

MacKelcan, Q.C., for the plaintiff.

A. D. Cameron, for the defendants.

Rose, J.]

[March 16.]

RE BORTHWICK AND CORPORATION OF OTTAWA.

By-law—Fresh fish—Markets.

Sec. 1 of Art. IX. of a by-law passed by the corporation of the city of Ottawa provided that no person should sell any fresh fish elsewhere than in such places as shall be allotted and designated by the standing committee on markets in any of the aforesaid markets. Sec. 1 of Art. X. provided that the vendors of any articles, in respect of which a market fee might, under the Municipal Act, be imposed, might lawfully, without paying market fees, offer for sale any such articles at any place within the city, excepting the market-places thereof. Sec. 1 of Art. IV. provided that all produce, provisions, or articles of any kind brought to any of the meat, fish and produce markets and exposed for sale, should be placed in boxes and exposed in carts or other vehicles which should be placed upon said markets under the direction of the market inspector, etc. Any persons refusing to comply therewith, or to remove such articles, vehicles, boxes, etc., after selling their contents, should be subject to the penalty imposed by the by-law and liable to expulsion from the market. It appeared that the by-law was a consolidation of previously existing by-laws passed from time to time; and that many years ago certain stalls in each market were set apart as fish markets, and that no application was ever made for standing-room for carts or other vehicles from which to sell fish, and no provision made by the council for so bringing fresh fish to the markets.

Held, that sec. 5 of Art. IV., though wide enough to cover fresh fish, would appear not to have been framed with reference to it, and that reading sec. 1 of Art. IX. and sec. 1 of Art. X. together they could be reconciled by construing them as providing that fresh fish might be sold in stalls and nowhere else in the

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markets; but outside of the markets no restrictions should be placed on selling.

A motion to quash the conviction was therefore refused.

Shepley, for the motion.

MacLennan, Q.C., contra.

CHANCERY DIVISION.

Divisional Court.]

[February 12.]

BRIDGES V. THE REAL ESTATE, LOAN
AND DEBENTURE CO.

Action by second mortgagee against assignee for value, without notice of first mortgage—Defence—Registry Act.

Y., being the owner of certain land, mortgaged it with other lands to The P. B. Society, by mortgage dated July 12th, 1873, registered July 14th, 1873. Subsequently, being desirous of selling part of the property and paying off the mortgage, by an agreement in writing he arranged with the society to leave the mortgage standing, take a further loan of \$700 and have certain of the lands released (of which the lot in question was part) by the society. A second mortgage for the \$700 advance was prepared and executed, dated February 1st, 1875, registered February 11th, 1875, which by mistake included all the lands in the first mortgage, and a release dated February 9th, 1875, was duly executed by the society releasing the lot in question from the operation of the mortgage of July 12th, 1873, and was afterwards registered March 20th, 1876. B., the plaintiff, being aware of the agreement, but unaware that the second mortgage included the lot in question, which should have been omitted, loaned Y. certain moneys, and took a mortgage dated May 21st, 1877, registered June 6th, 1877, to secure the payment thereof. The society assigned the second mortgage and all moneys secured thereby to the defendant by assignment dated March 1st, 1880, registered January 17th, 1881, and by deed dated March 1st, 1882, registered June 2nd, 1883, Y. conveyed his equity of redemption to B.

In an action by B. to correct the mistake by compelling the defendants to convey the lot in question to him, it was

Held (sustaining the judgment of FERGUSON, J.), that the combined operation of R. S. O. c. 111 s. 8, and R. S. O. c. 95 s. 8, formed a complete defence against the plaintiff's right to maintain the action, and that whatever doubt may have existed before, there is now none that the assignee of a mortgage for value having the legal estate may defend as a purchaser for value without notice, and claim also the protection of the Registry Act as against a subsequent purchaser or mortgagee from the original mortgagor.

G. Bell, for the plaintiff.

A. C. Galt, for the defendant.

Proudfoot, J.]

[February 18.]

ZUMSTEIN V. HEDRICK.

Will—Devise to son who died before testator—R. S. O. c. 106—Lapse.

H. made his will on October 10, 1868, devising land to his son, J., without words of limitation, and added a codicil on February 23rd, 1870, by which he confirmed the will, save as changed by the codicil. J., the devisee, died February 17, 1874, and H., the testator, died December 15, 1879.

Held, that as the will was made and republished by the codicil prior to January 1, 1874, the sections subsequent to sec. 7 of R. S. O. c. 106, and among them sec. 35, did not apply, and that the former law as to lapse governed this case, and that under that law the devise to J. lapsed.

Lash, Q.C., for the plaintiff.

White, for the defendant.

Ferguson, J.]

[March 31.]

LEAN ET AL. V. HUSTON ET AL.

Article patented in foreign country—Improvements—Original ideas—Employment of mechanic to make model—Enjoining manufacture under a patent obtained by him.

The plaintiffs were the patentees of a certain invention in the United States, and being desirous of having the article, with some improvements, patented in Canada, one of them employed one of the defendants, a mechanic,

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to make a model, and under the pledge of secrecy, placed the United States patent in his hands, and imparted to him his ideas as to the improvements. It was afterwards discovered that the defendant so employed had, during his employment, taken out a patent for a similar article, under which he and the other defendants were manufacturing. In an action brought to set aside this patent, and for an injunction restraining the manufacture by the defendants of the article, in which action it was contended on their behalf that the article was not protected in Canada by the United States patent, and, in fact, that the idea was public property. It was

Held, following *Morison v. Moat*, 9 Ha. 241, that the plaintiffs had the right to succeed as to the injunction, or that their title was good as against the defendants, even though they might not have a good title against the public, and the injunction was granted.

Moss, Q.C., and *F. E. Hodgins*, for plaintiffs.
Bain, Q.C., and *Malone*, for defendants.

PRACTICE.

Mr. Dalton, Q.C.]

[March 25.]

THE QUEBEC BANK V. RADFORD ET AL.

Judgment—Rule 80, O. J. A.—*Married Women's Property Act*, 1884.

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, as indorser, where the note matured after the passing of the Married Women's Property Act, 1884 (47 Vict. c. 19 O.), and where there was no allegation that the married woman was possessed of separate estate. The following limitation was imposed in the order for judgment: That the amount of the judgment should be levied and payable out of the defendant's separate property (if any) of which she was possessed or entitled to at the time of the making of the note, or out of any separate property which she may thereafter acquire or have acquired, and which she is not restrained from anticipating.

D. T. Symons, for the plaintiff.

The defendant was not represented.

Mr. Dalton, Q.C.]

[March 25.]

CAMERON V. RUTHERFORD ET AL.

Judgment—Rule 80 O. J. A.—*Married Women's Property Act*, 1884.

Judgment was granted under Rule 80, O. J. A., in an action on a promissory note against one of the defendants, a married woman, where the marriage and the maturity of the note were before the Married Women's Property Act, 1884 (47 Vict. ch. 19 O.), following the case of *Burrill v. Tanner*, 13 Q. B. D. 691.* The same limitations as to execution were imposed as in *The Quebec Bank v. Radford*, *supra*, and in *Burrill v. Tanner*.

Lefroy, for the plaintiff.

Aylesworth, for the defendant.

* See also *Gloucestershire Banking Co. v. Phillips*, 12 Q. B. D. 533, and *Weldon v. Noel*, 51 L. T.

Ferguson, J.]

[March 30.]

BINGHAM V. WARNER.

Jury notice — Sec. 45 O. J. A.

In an action brought in the Chancery Division by a landlord against his tenant, the statement of claim prayed specific performance of a covenant to repair, or damages for breach of the covenant. A jury notice was served by defendant.

Held, that the action was in effect a common law action, notwithstanding the frame of the statement of claim, for specific performance of such a covenant would not be decreed, and the defendant was entitled under sec. 45 O. J. A. to the benefit of his jury notice.

Cattanach, for the plaintiff.

Hoyles, for the defendant.

Rose, J.]

[April 7.]

BAKER V. JACKSON.

Examination of witness de bene esse—*Ex parte order*—*Affidavit of information and belief*.

[An action in the Common Pleas Division.]

An *ex parte* order of a local judge for the examination of a witness *de bene esse* on the ground that he was dangerously ill and not likely to recover was affirmed on appeal.

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Held, that the Chancery practice must be followed, and that by it the local judge had jurisdiction to make the order *ex parte*.

Semble, that an affidavit of the solicitor of his information and belief that the witness was dangerously ill was sufficient.

The affidavit and the circumstance that the order was not acted upon for thirteen days after it was issued were regarded as unsatisfactory, and limitations were imposed upon the use at the trial of the evidence taken under the order.

H. J. Scott, Q.C., for the appeal.

Holman, contra.

Rose, J.]

[April 7.]

**BULL V. NORTH BRITISH CANADIAN
INVESTMENT COMPANY ET AL.**

Amending statement of claim—Changing place of trial—Rule 179 O. J. A.

The plaintiff, having in his statement of claim named Toronto as the place of trial, afterwards amended it on *précipe* under rule 179 O. J. A., naming in the amendment Belleville as the place of trial.

Held, on appeal, affirming the decision of the Master in Chambers, and following *Freitsh v. Winkler*, 3 Chy. Cham. Rep. 109, decided under Chy. G. O. 81, which is substantially the same as rule 179, that no change of the place of trial could be made by amendment of the statement of claim.

Millar, for the plaintiff.

Creelman and *Urquhart*, for the defendants.

Mr. Dalton, Q.C.]

[April 5.]

Rose, J.]

[April 10.]

THE DAVIES B. & M. CO. V. SMITH.

Executions—Money paid to sheriff—Creditors' Relief Act, 1880.

The plaintiffs placed a writ of execution against the defendant in the hands of the sheriff of Ontario on the 6th December, 1884.

The sheriff seized the defendant's goods on the 8th December.

The defendant made a mortgage of his goods to D. on the 9th December.

B. placed a second execution against the defendant in the hands of the sheriff on the 22nd December.

On the 31st December the mortgagee, D., paid to the sheriff the whole amount of the first execution, \$115, specially appropriating the payment to that execution, and the sheriff in like manner received the money on that execution.

Held, that the money paid to the sheriff was not "levied" by him within the meaning of the Creditors' Relief Act, 43 Vict. (O.) c. 10, and that the first execution creditor was entitled to the whole of it.

Holman, for the sheriff.

Watson, for the first execution creditors.

H. D. Sinclair, for the second execution creditor.

J. R. Roaf, for the claimant.

Ferguson, J.]

[March 16.]

PETRIE V. GUELPH LUMBER CO. ET AL.

STEWART V. GUELPH LUMBER CO. ET AL.

INGLIS V. GUELPH LUMBER CO. ET AL.

Costs—Taxation—Appeal—Cases printed and argued together—Defendants severing.

Appeal from the certificate of one of the taxing officers on the taxation of the costs of these actions in the Court of Appeal.

Quare, whether the appeal should not have been to a judge of the Court of Appeal.

The defendants were the same in all three actions. The actions were brought against the defendants other than the company as wrongdoers. They were sued for an alleged conspiracy to defraud, which, it was alleged, they carried into effect by defrauding the plaintiffs respectively. The defendant, McLean, defended meeting the charge directly. The other defendants did the same, but they further said that they obtained their information from McLean, and that they believed it to be true, and believed that the statement made by them and McLean, which is the foundation of the actions, was true.

Held, that the taxing officer was right in allowing two bills of costs, one to the defendant, McLean, and one to the other defendants.

Prac.]

NOTES OF CANADIAN CASES—LAW STUDENTS' DEPARTMENT.

When the actions were in the Court of Appeal, BURTON, J. A., made an order that only one appeal book should be printed for the three cases, and the three cases were argued together.

Held, that the taxing officer was right in allowing separate counsel fees in each case.

Appeal dismissed with costs.

Cruelman, for the plaintiffs.

Walter Barwick, for the defendant, McLean.

Richard Cassels, for the other defendants.

Mr. Dalton, Q.C.]

[April 14.]

ONTARIO BANK V. BURK.

Special endorsement—Judgment—Rules 14 and 80, O. J. A.

The following endorsement, specially endorsed on a writ of summons under Rule 14 O. J. A., was held insufficient for a motion for judgment under Rule 80 O. J. A.:

"The plaintiffs claim is \$1,702.72, for money lent by the plaintiffs to the defendant, the same being the amount due to the plaintiffs in respect of the defendant's overdrawn bank account with the plaintiffs' branch or agency office at P., and interest thereon from the 1st day of December, 1884, until judgment."

Held, that it was necessary for the defendant's information to state the date at which his account was overdrawn to the amount specified.

Walter Barwick, for the plaintiffs.

Watson, for the defendant.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

SECOND INTERMEDIATE.

EQUITY.—HONORS.

1. Explain the doctrine of resulting use, and state the effect of the Statute of Uses upon that doctrine as to the vesting of the legal estate in lands.

2. A., being the absolute owner of certain lands, voluntarily executes a declaration of trust thereof

in favour of B. Does B. take any interest in the lands? Give reasons.

3. A testator devises Blackacre to A., charged with payment of \$1,000 to testator's wife, and Whiteacre to B. in trust to pay the testator's debts, which are subsequently found to amount to \$1,000. A. and B. are both strangers to the testator. Each of the properties is worth \$2,000. What beneficial interests, if any do A. and B. respectively take?

4. A mortgage contains an express provision that in the event of default being made in payment for one year, the mortgagor shall lose his right to redeem and the mortgagee's title to the land become absolute, and that time shall be deemed strictly of the essence of the contract. Default is made for a year, and the mortgagor afterwards tenders payment to the mortgagee, who refuses to accept same. The mortgagor brings an action to redeem. Can he succeed? Give reasons.

5. A married woman has obtained judgment in an action for alimony, but fears that her husband is about to dispose of his farm for the purpose of defeating her claim. What statutory provision is there enabling her to provide against this?

6. A brings an action against B. which is dismissed with costs, but without paying these costs he again brings another action against B. for the same cause. What statutory remedy has B.?

7. Land is sold under order of the Court in an action, and the proper persons to convey, although parties in the action, cannot be found. How can title be made to the purchasers?

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for March 28 and April 4 contain *The Poetry of Tennyson*, and *George Eliot, Contemporary*; *Hadrian's Address to his Soul, National Review*; *The Life of George Eliot, Fortnightly*; *Finland: a Rising Nationality*, by Prince Kropotkin, *Nineteenth Century*; *Clementina Sobieska, Temple Bar*; *The Trade of Ancient Egypt, Science Monthly*; *Nursing as a Fine Art, Lancet*; *Prisoners of War in England, Spinning-Wheels in New England*, and *The Seventh Centenary of the Temple Church, Saturday Review*; *Academic Belles-Lettres*, *Some Turkish Proverbs*, and *The Dean of Wells on the Future Life, Spectator*; with instalments of "A House Divided Against Itself," "Plain Frances Mowbray," "Mrs. Dymond" and the conclusion of "A Millionaire's Cousin."

A new volume begins with the number for April.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4.00 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

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No. 9.

DIARY FOR MAY.

1. Fri.....Prince Arthur born, 1850.
2. Sat.....J. A. Boyd, Chancellor, 1881.
3. Sun.....*4th Sunday after Easter.*
5. Tue.....Sitting of Supreme Court of Canada—First Intermediate Examinations.
7. Thur.....Second Intermediate Examinations.
10. Sun.....*5th Sunday after Easter.* Hagarty, C.J., Ont., and Wilson, C.J., Q. B., 1884.
12. Tue.....Ct. App. Sitt. and Co. Ct. Sitt. (York) commence. Solicitors' Exam.
13. Wed.....Barristers' Examinations.
14. Thur.....Ascension Day.

TORONTO, MAY 1, 1885.

THE dinner of the Osgoode Legal and Literary Society on the 22nd ult., of which we publish a notice in another place, was a great success and reflected much credit upon the committee who had the matter in hand. The dinner itself, considering the difficulties to be contended with, was good, the speeches better, those of the juniors being comparatively the best of all. This Society is evidently doing a good work, and we commend to our readers the remarks of the chairman in reference thereto. To those who are "given to change," and especially to those radical reformers in the conservative ranks of Her Majesty's loyal opposition in the Local Legislature, we would commend his very sensible observations (those of a prominent and rising member of that party) on the subject of decentralization.

The entertainment was really more a Bar dinner than anything else. We trust it may be continued as such, but with this change, the price of the tickets, at least for students, to be placed at a much lower figure, so that they may be able to attend without going beyond their means. Various ways of effecting this end present

themselves, some of which will, we trust, ere next year be thought out and arranged.

WE had a feeling of respect for Mr. De Souza, who pluckily went to work to fight the Bench, Bar and Law Society single handed. But "there is a limit to everything," and "enough is as good as a feast." He has now become an "irrepressible," and must, of course, be suppressed. This time he hurled himself against the Court of Appeal, and again found the Bench an immovable body; probably by this time he has come to the conclusion that he is not an irresistible force. His courage failed him at the crucial point, and, instead of being taken in charge by the sheriff, as appeared to have been his aim, he simply "wilted." If he had further persisted, the Chief Justice of the Court of Appeal would either have had to adjourn the Court, or maintain its order by ordering his removal as an obstruction to business, in which latter case this much ill-used person would doubtless have found some newspaper prepared to laud his heroism, lament his woes, and abuse the judges for a tyrannous abuse of their powers, whilst a rather disgusted Bar and an amused populace would have concurred in the verdict of "served him right."

SOME of our most respected judges have recently been subjected to most objectionable criticism imputing improper motives and political bias. The subject of commitment by judges for contempt of Court has also been discussed, or rather this power has been reviled, as a relic of bar-

CONTEMPT OF COURT—LEGISLATION IN ONTARIO.

barism, and an engine of tyranny, which should be got rid of at once. There is generally an outburst of this kind following on some case coming before the Courts in which party politics are more or less mingled. Judges have, of course, in such cases, to give a judgment of some sort which is necessarily displeasing to the losing side, and the political allies of the latter at once go into a phrensy of indignation and abuse the judge much in the same way as the other side would if his judgment had been the other way. In connection with this we venture to express a regret that Chief Justice Cameron should have taken the trouble to allude to any of these attacks. Newspaper criticism of this kind has now arrived at such a point that it has very little effect upon readers at large, and none at all upon intelligent thinking people.

A PERSON signing himself "Barrister," produced lately in the columns of a daily paper an effusion which Chief Justice Cameron, unnecessarily, we think, honoured by referring to in terms all too courteous, if worth noticing at all. Few laymen could have written anything more childish, or evincing more absolute want of any thought on, or knowledge of, the subject discussed by this person. We have too high an opinion of the intelligent education of our Bar to believe that a barrister of Ontario ever wrote the letter at all. One would suppose from the tone of it that hundreds of respectable citizens were pining in our prisons as the victims of the personal malice and wounded spleen of the various Jeffreys of our Bench. One would hardly suppose that, so far as we can remember, there has not been for some thirty years or more, one single lawyer or litigant committed for contempt of court; though it would occasionally have saved much valuable time to the country and

pleased an indignant public if the power had been exercised. The power is a most wholesome one, and one that the judges *ought* to have for the benefit of suitors and the public generally. When the judges get into the habit of using it for vindictive purposes it will be time enough to talk about taking it away. At present there is no such indication. "Barrister" and others interested would do well to read and digest the admirable judgments of Willes, J., and Byles, J., in the case of *Re Fernandez*, 10 C. B., N. S. 3, where the whole subject of commitment for contempt is discussed, and the necessity for the existence of the power maintained.

LEGISLATION IN ONTARIO.

WE publish in another column a letter from a correspondent as to recent legislation as affecting decided cases.

In connection with this matter there can be no doubt chapter 26 of the last session of the Ontario Legislature is intended to set at rest some of the difficulties which have arisen under the Fraudulent Preference Act, R. S. O. cap. 118. The opinions of our judges under the last-mentioned Act have been numerous and diverse, and the true interpretation of the Act has not yet been fully settled by the Supreme Court. The main difficulty arose in dealing with the words "with intent to defeat," etc.

Some of the decisions go to show that where a conveyance, assignment, or other instrument mentioned in the Act has the effect of defeating, hindering, or delaying a creditor, the law presumes it to have been executed with that intent.

Such was the decision in *McLean v. Garland*, 32 C. P. 524; 10 A. R. 405, where the exact question arose. See, also, *Clark v. Hamilton Provident Company*, 21 C. L. J. N. S. 57. So far as the actual intent to

LEGISLATION IN ONTARIO—RECENT ENGLISH DECISIONS.

prefer or delay was concerned, all the judges who pronounced upon the case considered that there was no such intent; and in the Court of Appeal, Cameron, C. J., and Patterson, J. A., dissenting from the rest of the Court, thought that the appeal should be allowed and the assignment upheld. The case has been already argued in the Supreme Court, and is standing for judgment.

The new Act, after reciting that difficulty is experienced in determining cases arising under the present law (R. S. O. cap. 118), and it is desirable to remedy the same, goes on to provide that "every gift, conveyance, assignment, etc., made . . . with intent to defeat, etc., or which has such effect," shall, as against creditors, be utterly void. This is evidently aimed directly at such a case as *McLean v. Garland*, and supports the decision hitherto given. But if every conveyance which has the effect of defeating, hindering, delaying or preferring a creditor of an insolvent is utterly void, why should the former provision relating to conveyances made "with that intent" be still retained? It appears to us that in removing one difficulty the Legislature have created a much more formidable one, for it is scarcely possible to draw an assignment which shall not have the effect, to some extent or other, of hindering or delaying a creditor. (See the remarks of Osler, J., in *Gallagher v. Glass*, 32 C. P. 641, and Patterson, J. A., in *Alexander v. Wavell*, 10 A. R. 135.) We fear that the effect of this Act will be to increase manifold the difficulties attending this branch of our law, and instead of cutting the Gordian knot, to add one more loop to its tangles.

Chapter 27 of the recent Acts is a beneficial amendment to the law of bills of sale and chattel mortgages. The point intended to be met was decided against the mortgagee in *Pinkerton v. McLean*, 7 A.

R. 490, which is therefore now no longer law.

RECENT ENGLISH DECISIONS.

THE April numbers of the Law Reports comprise 14 Q. B. D. pp. 377-560; 10 P. D. pp. 33-61; and 28 Ch. D. pp. 333-469.

CHARGE OF DEBTS ON LAND—STATUTE OF LIMITATIONS

Very few of the cases in the Queen's Bench Division seem necessary to be noticed here, most of them being decisions in bankruptcy; but the case of *In re Hepburn* (14 Q. B. D. 394), which was a bankruptcy case, deserves a passing notice for one of the points discussed in it. A testator had, by his will, charged his debts upon his real estate—he died without leaving any real estate—and the question was, whether the trust to pay debts contained in his will would prevent the running of the Statute of Limitations. Upon this point Cave, J., remarked: "John Hepburn's will does, in fact, contain a trust for the payment of his debts out of his real estate; but John Hepburn left no real estate whatever, and it seems to me that this case falls within the principle of *Scott v. Jones*, 4 Cl. & F. 382. In that case Mr. Donovan, by his will, charged his debts upon his real estate at Tibberton. * It turned out that his estate there, which he supposed to be freehold, was leasehold only; and it was held that the operation of the statute was not prevented by the charge in the will, even as to that part of the personal estate which he had erroneously supposed to be realty. Now, if the charge does not affect that part of the personal estate which is erroneously supposed to be realty, how can it affect that part which is not supposed to be realty, or, in other words, how can it have any effect upon the personalty at all? I am of opinion that a charge upon real estate, where there is no real estate, has no operation whatever." The case is also worthy of notice for the observations

RECENT ENGLISH DECISIONS.

of the learned judge on the common form of expression that the Statute of Limitations bars the remedy but not the right. "This," he says, "although not an uncommon, is, in my judgment, an incorrect way of stating the effect of the Statute of Limitations. There is in law no right without a remedy; and, if all remedies for enforcing a right are gone, the right has, in point of law, ceased to exist. In the case of a debt the ordinary and universal remedy is by action against the debtor. There may, however, and sometimes does, exist another remedy, not by action against the debtor, but arising out of the possession of property of the debtor, which, by law or contract, may be detained by the creditor until the debt is paid. This latter remedy may exist although the remedy by action is barred; and, in that case, the debt continues to exist so far as is necessary for the enforcement of this right of lien, but not for enforcing the remedy by action. When the debt is barred by the statute, and the creditor has no lien, the debt is gone for all purposes."

EVIDENCE—ADMISSION OF DECEASED PERSON AGAINST HIS INTEREST.

The next case we find deserving of notice is that of *ex parte Edwards* (14 Q. B. D. 415), a decision of the Court of Appeal upon an application for leave to appeal to the House of Lords from the decision of the Court of Appeal in *ex parte Revell*, 13 Q. B. D. 720 D. One of the points upon which it was desired to appeal, was upon the question whether an admission by a bankrupt in his statement of affairs, that a debt is due from him, could, after his death, be used as evidence against his assignee to establish the debt. Leave to appeal was refused; and upon this point Brett, M. R., said: "It is said that the bankrupt's statement was an admission against his interest, made by a man who has since died. This is an attempt to enlarge the rules as to the admissibility in

evidence of admissions against interest. The rule is, that an admission which is against the interest of the person who makes it, at the time when he makes it, is admissible; not that an admission, which may, or may not, turn out at some subsequent time to have been against his interest, is admissible. This statement does not, therefore, fall within the recognized rule."

WIFE'S SEPARATE PROPERTY—HUSBAND TRUSTEE FOR WIFE.

The next case, *ex parte Sibeth* (14 Q. B. D. 417), is a bankruptcy decision, but upon a point of general interest, inasmuch as it establishes that the rule that a husband is trustee for his wife of her separate property, when no other trustee has been appointed, applies to that which becomes her separate property by virtue of a marriage contract entered into in a foreign country.

The case which follows, viz.: *ex parte Whitehead* (14 Q. B. D. 419), is a decision of the Court of Appeal upon the same subject. In that case it was verbally agreed by husband and wife upon their marriage that a sum of money standing to the wife's credit at a bank in her maiden name should be her separate property. Nothing further was done, but after the marriage, the money, with the husband's consent, remained at the bank in the wife's maiden name, and she received the interest on it for two years after the marriage when she drew the money out of the bank. The husband became bankrupt and his trustee claimed the fund as part of the bankrupt estate, on the ground that there had been no part performance of the agreement to settle to take the case out of the Statute of Frauds, and Cave, J. held him entitled to it; but the Court of Appeal without deciding the question on the Statute of Frauds, came to a different conclusion, on the ground that there had been a gift of the money by the husband

RECENT ENGLISH DECISIONS.

to the wife after the marriage, and that he had become a trustee of it for her, as her separate property. Brett, M. R., thus puts the case: "The only inference which I can draw from the facts is that the husband allowed the money to remain in his wife's former name in the bank, and allowed her to go on drawing cheques for the interest and the principal as she required the money, in order to carry into effect the promise which he had made to her before the marriage. There was a gift of the money to her, and he became her trustee."

TERMINATING TENANCY ON NOTICE—SERVICE OF NOTICE.

We have now to consider the case of *Hogg v. Brooks* (14 Q. B. D. 475), which was an action of ejectment brought against a tenant of a mortgagee of leasehold premises. The demised premises were held under a lease for twenty-one years, which contained a proviso that it should be lawful for the landlord or his assigns, to put an end to the lease at the end of the first fourteen years, by delivering to the tenant or his assigns, six calendar months' previous notice in writing of his intention to do so.

The lessee mortgaged the premises by way of underlease, and disappeared; the mortgagee entered into possession and sub-let the premises to the defendant. The plaintiff, as assignee of the reversion, had served written notice by sending it to the lessee's last known address (but which it was admitted never reached him), and also leaving it with the mortgagee, and also upon the demised premises; and the question for the consideration of the Court was whether or not the notice had been sufficiently served on the lessee in order to terminate the lease under the proviso; and the Court (Matthew, J.) was of opinion that the notice had not been duly served. "The lease makes no provision for any such constructive service, but provides for a direct service of the notice on the

lessee or his assigns. Purkis (the mortgagee) is not assignee, but only a sub-tenant, and the notice could only be served by delivering it to Curtis (the original lessee). This has not been done, and the plaintiff must fail."

This concludes the cases which we think necessary to notice in the Queen's Bench Division; with the exception of *Tomlinson v. The Land and Finance Corporation, Limited*, a note of which will be found in our notes of English Practice Cases.

The first case in the April number of the Chancery Division is *Eden v. Weardale Iron and Coal Company*, of which a note will also be found in our notes of English Practice Cases.

PARTNERSHIP—FIRM OF SOLICITORS—LIABILITY OF PARTNERS FOR MISFEASANCE OF CO-PARTNERS.

The case of *Cleather v. Twisden* (28 Ch. D. 340) is an important decision, touching the liability of the members of a firm of solicitors, for the misappropriation of the securities of clients entrusted to the custody of one of the firm. In this case, the trustees under a will deposited certain bonds, payable to bearer, with Parker, a member of a firm of solicitors who were acting for the estate. His partner had no knowledge of this; but letters referring to the bonds, and admitting that they were in P.'s custody, addressed to the *cestui que trust*, were copied into the firm's letter-book, and were charged for in the bill of costs of the firm, and the bonds were included in a statement of account which the firm made out for the trustees. Parker paid some of the interest of the bonds by cheques of the firm, but on each occasion recouped the firm by a cheque for the same amount on his private account. Parker having misappropriated the bonds, the trustee sued his co-partner, Twisden, to compel him to make good the loss. Denman, J., had held him liable, but the Court of Appeal considered that, inasmuch as the custody of

RECENT ENGLISH DECISIONS.

bonds payable to bearer is not within the ordinary scope of the business of a firm of solicitors, the cheques, letters and entries were too ambiguous to affect the defendant with acquiescence in his partner, Parker, having the custody of the bonds as part of the partnership business, and that, therefore, he was not liable for their misappropriation. In connection with this case we may refer to a recent case before Kay, J., of *Mannus v. Mew*, noted in the *Law Times* for 28th March last, where a partner in a firm of solicitors was held liable for the misappropriation by his co-partner of the moneys of a client received by the firm for investment.

SPECIFIC PERFORMANCE—ALTERNATIVE CLAIM FOR DAMAGES.

In *Hipgrave v. Case* (28 Ch. D. 356), which is the next case to be noticed, the action was for specific performance of a contract of sale to the defendant of a house and goodwill, fixtures and stock-in-trade of a business. The statement of claim claimed specific performance of the contract, or in the alternative, for the payment of £100 as liquidated damages fixed by the contract. The statement of defence alleged false representations by the plaintiff as to the character of the business, and denied that plaintiff was able and willing to perform the contract on his part. After the close of the pleadings the plaintiff gave the defendant notice that unless the defendant would complete the purchase within a week he would re-sell the business, which he accordingly did. No amendment was made in the pleadings, and the action went to trial, when the plaintiff's counsel, while admitting that the claim for specific performance must be abandoned, claimed to recover the £100 as liquidated damages. Bacon, V.-C., before whom the case was tried, dismissed the action on the ground that the alternative right to damages did not arise until there had been a default in

specific performance, and the plaintiff himself, having rendered specific performance impossible, was not entitled to damages. This decision the Court of Appeal now affirmed; the ground of the judgment is thus shortly stated by the Master of the Rolls: "I think that the plaintiff, having by the form of his pleadings and by his conduct of the case, elected to put his claim as one for specific performance, with an alternative claim for damages merely as a substitute for specific performance in case, for any reason, the Court should feel itself unable to give effect to his prayer for specific performance, the plaintiff cannot now be allowed to change the whole nature of his action, by turning it into an ordinary action for damages as at common law."

COMPANY—TRANSFER OF SHARES—REFUSAL OF COMPANY TO REGISTER TRANSFER.

In the case which follows of *ex parte Harrison, In re Cannock and Rugely Colliery Co.*, the Court of Appeal over-ruled the decision of Bacon, V.-C., on a question of company law, respecting the right of directors to refuse to register a transferee of shares. By the articles of association it was provided, that the directors might refuse to register a transfer of shares while the transferor was indebted to the company, or if they should consider the transferee an irresponsible person. It was also provided, that persons becoming entitled to shares on the bankruptcy of a shareholder, might be registered on the production of such evidence as might be required by the directors, and that any transfer, or pretended transfer, not approved by the directors, should be void. A shareholder, who was indebted to the company, executed a transfer of his shares to the nominee of a bank as a security for advances, and the directors refused to register the transfer. Subsequently, the shareholder became bankrupt, and his trustee, with the consent of the bank and

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their nominees, applied to be registered. The bank, though consenting to the trustee's registration, had never waived their security; the directors refused to register the trustee. Bacon, V.-C., had held they were wrong, but the Court of Appeal held them to be justified in their refusal, and that their declining to register the transfer to the bank's nominee was not a disapproval of the transfer so as to render it void under the articles, and that the trustee was not entitled to the shares so long as the transfer to the bank's nominee remained in force, and was not entitled to be registered, notwithstanding the consent of the transferees. Lord Selborne who delivered the judgment of the Court (after stating that the proviso which made transfers void which were not approved by the directors applied to cases where the transferee was rejected as an irresponsible person, and not to the case of a refusal to register a transfer because the Company's interest is involved), proceeds to remark upon the effect of the bank's consent: "We had no evidence of the meaning of that consent, but the counsel for the trustee in liquidation has candidly told us that the bank had no idea of giving up their security. They consented in order to get rid of the right of the company to a set-off in respect of their claim; and if they could have procured the transfer of the shares into the name of the trustee, then some arrangement was to be made to give effect to their interest. It seems to me, that the company was entitled to say, that the twentieth article relates only to the title which the trustee in liquidation has under the Bankrupt Act, and does not enable a prior transferee and such trustee to combine their titles in this manner for the purpose of enabling the trustee to be registered on behalf of both, and so to get rid of the company's right under Article 17."

SOLICITOR—ARTICLED CLERK—PREMIUM.

Passing over several cases of no special interest or application in this Province, we come to the case of *Ferris v. Carr* (28 Ch. D. 409), in which the father of a solicitor's articulated clerk, sought to recover a proportionate part of a premium paid to a solicitor who had died, on the ground that, by the death of the solicitor, it had not been fully earned; but Pearson, J., not without some hesitation, came to the conclusion that there was no obligation in law to return any part of the premium under such circumstances, and neither could the Court, by virtue of its summary jurisdiction over solicitors, say that a different rule should be applied to a contract of this kind between a third person and a solicitor than would be applied to a like contract between other persons.

INFANT—JOINT TENANCY—SEVERANCE.

We have noticed the next case, *Drage v. Hartopp*, in our notes of recent English Practice Cases, and now proceed to consider that of *Burnaby v. Equitable Reversionary Interest Society* (28 Ch. D. 416), in which the short point was, whether an infant who was entitled in remainder jointly with two others to a share in Bank annuities standing in the name of trustees, had by her marriage settlement, which contained a proviso for the settlement of the present and after acquired property of the intended wife, thereby severed the joint tenancy. The wife attained twenty-one, and died without having attempted to repudiate or avoid the covenant in the settlement, but having made a will in pursuance of powers thereby given her. Two points were taken—first, that the infant's deed being voidable could not sever the joint tenancy, and, second, that being under coverture until she died, she could not deal with her reversionary property either by way of ratification of a voidable deed or otherwise. But Pearson, J., was

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of opinion that the deed of the infant, although voidable, did not need confirmation, but if not avoided would bind her property, though it did not bind her personally, and that therefore the settlement had effectually severed the joint tenancy.

PARTIES—ACTION FOR ACCOUNT AGAINST MEMBERS OF CHURCH BUILDING COMMITTEE—ATTORNEY-GENERAL.

In the next case of *Strickland v. Weldon* (28 Ch. D. 426), five members of a Church Building Committee, on behalf of themselves and all other members of the committee, brought an action for an account against a former member of the committee, and it was held that the plaintiffs were merely agents for the subscribers to the building fund, and that the action could not be maintained by some of the agents against others, and that even if all the subscribers were suing, the action could not be maintained without making the Attorney-General a plaintiff. Pearson, J., observes: "In my opinion the plaintiffs are not trustees in the ordinary sense of the word; the members of the committee are nothing but agents—every one of them is an agent for the subscribers, and, to my mind, the notion that two agents out of three can sue the third for money which the principal has directed to be paid to him is an entire novelty.

"But, in addition to that objection, this fund is a charitable fund, and I conceive that if all the subscribers were named in the writ as plaintiffs, the action would nevertheless be defective, because the Attorney-General is not here. The Attorney-General is the only person who can really represent a charity, and sue on its behalf, and on that simple ground I must refuse to make any order upon the summons."

WILL—GIFT OVER—REMOTENESS—PERIOD OF ASCERTAINING CLASS.

The case of *Watson v. Young* (28 Ch. D. 436) is one concerning the construction of a will. The devise in question was upon

trust for J. for life, and after his death for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age; but in case there should be no child, nor the issue of any child of J. who should attain twenty-one, then in trust for the child or children of R. who should attain twenty-one. There was also a trust to accumulate the rents during twenty-one years from the day next before the day of the testator's death, and the accumulated fund was to be held in trust for the child or children of R. who should attain twenty-one. J. died without ever having had a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest attained twenty-one, but before the end of the period of accumulation.

The question turned upon the validity of the gift over in favour of the children of R. It was said on the one hand that the gift was void for remoteness, because it was a gift in case there should be no child, nor the issue of any child of J. who should live to attain the age of twenty-one, which might not happen during a life in being and twenty-one years after. On the other hand it was contended that the gift over should be read as divisible into two alternative gifts, viz.: (1) in case there shall be no child of J.; and (2) in case there shall be no child or issue of a child who should attain twenty-one; and that the first of those alternative gifts was clearly valid. Pearson, J., gave effect to this contention, and held the gift over valid. On the question whether the child who had been born before the end of the period of accumulation, but after the eldest of R.'s children had attained twenty-one, was entitled to share in the accumulations, he came to the conclusion that all children born before the end of the period of accumulation were entitled to share. On this point he said: "So far as I can

RECENT ENGLISH DECISIONS.

judge from the expressions used by the judges in other cases; they seem to be of opinion that the period which closes the class, is the period when the first member of the class becomes entitled to the actual possession or enjoyment of his share."

ADMINISTRATION—TRUST FOR PAYMENT OF DEBTS—EXONERATION OF GENERAL PERSONAL ESTATE.

We have next to consider *Trott v. Buchanan* (28 Ch. D. 446). In this case a deed was made by a testator in his lifetime whereby he conveyed real and personal estate to trustees, in trust for himself for life, and after his death for payment of his debts and funeral expenses, and after such payment upon trust, for his sons and their children; and the question was, whether this deed had the effect of exonerating the testator's general personal estate from its primary liability for the payment of his debts, and it was held that it had not, but that the personal estate comprised in the deed was the primary fund for the payment of the testator's debts. Pearson, J., says: "I am not aware of any authority which makes general personal estate the primary fund for the payment of debts as against personal estate specifically appropriated to that purpose. I confess I should have thought, but for the technical rule of law as to real estate, that when a testator had created a trust for the payment of his debts, he must be taken to mean that the trust property, whatever it is, is to be applied in the first instance in the payment of the debts, so as to exonerate his other property. As regards real estate, however, that cannot be so by reason of the rule of law which says that the personal estate is to bear the debts, unless the testator has, in so many words, or by some expression of intention of the strongest kind, said that it is to be otherwise. I do not, however, understand that that rule applies to personal estate."

WILL—GIFT TO CHARITY—"CHARITABLE AND DESERVING OBJECTS."

The only remaining case in the Chancery Division for April necessary to be referred to here is *In re Sutton, Stone v. Attorney-General* (28 Ch. D. 464), a case of construction of a will whereby the testatrix devised "that the whole of the money over which I have a disposing power be given in charitable and deserving objects, the amount being £600 sterling." On behalf of the next of kin it was argued that the objects might be either deserving or charitable, and that this was too indefinite to constitute a good charitable gift. It was admitted that if the words were "be given in charitable objects," the bequest would be good; but Pearson, J., was of opinion that the words "charitable and deserving objects" meant only one class of objects, and that the word "charitable" governed the whole sentence. As he put it, it was a case of English and not of law, and as he considered the proper meaning of the words used was that the objects were to be at once charitable and deserving he held the bequest to be valid.

It was also held that the word "money" did not include money invested in consols.

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REPORTS.

ENGLAND.

RECENT ENGLISH PRACTICE CASES.

TOMLINSON V. THE LAND AND FINANCE CORPORATION (LIMITED).

Interpleader issue—Security for costs.

In an interpleader issue directed upon the application of a sheriff, between an execution creditor upon whose execution the goods in question have been seized, and an adverse claimant, both parties to the issue are in the position of plaintiffs, and a defendant in the issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule that a defendant cannot be compelled to give security does not apply.

[14 Q. B. D. 539—C. A.]

An interpleader issue had been directed on the application of the sheriff, between the claimant of goods seized under execution, as plaintiff, and the execution creditors as defendants. The execution creditors were an insolvent company, which was being compulsorily wound up. The plaintiff in the issue applied for security for costs. The Divisional Court of the Q. B. D. had ordered security to be given, and the Court of Appeal affirmed the order.

BOWEN, L. J.—"In the present case the issue has been directed on the application of the sheriff; and it seems to me that the substance and not the form of the proceeding must be looked at; in that point of view the defendant company is really a plaintiff, and being insolvent is liable to give security for costs."

EDEN V. WEARDALE IRON AND COAL CO.

Third party—Counter claim by third party against plaintiff.

Rules S. C. of 1883—Ord. 16, rr. 48, 52, 53—Ord. 19, r. 3 (Ont. R. 107, 110, 111, 127).

The Court has no power to give a third party who has been served with notice by a defendant under Ord. 16, r. 48, leave to file a counter-claim against the original plaintiff.

[28 Ch. D. 333—C.A.]

FRY, L. J.—"The primary object of the introduction of a third party is to prevent the necessity of two actions. In the first place, it is for the determination of all questions between the plaintiff and the defendant who brings in the third party; and in the second place, for the determination of

questions between the defendant and the third party, against whom the defendant claims contribution or indemnity. I think it is confined to these two classes of questions. If the procedure is extended to questions between the plaintiff and the third party, it will cause great inconvenience to litigants."

DRAGE V. HARTOPP.

l'arties—Rules S. C. 1883, Ord. 16, r. 11 (Ont. R. 103).

[28 Ch. D. 414.]

One of two executors having absconded, the other executor sued a mortgagor without adding the absconding executor.

The Court refused, on the application of the defendant, to add the absconding executor as defendant.

PEARSON, J.—"A question may arise whether he (the absconding defendant) is interested in the subject matter, and if any question of that sort does arise, the Court will be able to deal with it and protect the defendant: I have no power to add him as a plaintiff. If he is added as defendant he would be out of the jurisdiction, and I have no evidence of where he is, and there is no evidence that it would be possible for the Court to make an order for substituted service."

I refuse to make the order.

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[Ct. Ap.]

NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**COURT OF APPEAL.****ROMNEY V. MERSEA.***Municipal drainage—Assessments for.*

A petition of ten proprietors for a by-law to construct a drain which benefited a great number of lots, and for which about 150 proprietors were assessed in two townships,

Held, not sufficient to support the by-law, which was therefore quashed.

Atkinson, for appeal.

Robinson, Q.C., contra.

YORK V. GRAVEL ROADS.*Injunction—Steam motor.*

The Court being equally divided, the appeal was dismissed.

Per BURTON and ROSE.—The state having interfered by 44 Vict. cap. 57 (O.), there should be a reference under that Act to ascertain the compensation.

Robinson, Q.C., and *Osler*, Q.C., for appeal.

J. K. Kerr, Q.C., and *Cassels*, Q.C., contra.

HOGG V. MAGUIRE.*Will—Obtained by undue influence.*

E. B. made a will, whereby he gave the bulk of his property to the plaintiff, his sister. The defendant, another sister, claimed under a second will made an hour or two before the testator's death. The evidence showed that testator was a very determined man, and not easily influenced; that he was suffering from excessive drinking; that he latterly spoke in offensive terms of defendant, and had frequently, and as late as a few days before his death stated that if he died everything was arranged, and that the plaintiff would get his property. Shortly before his death the defendant had him brought to her house. On the night of his death the physician in attend-

ance told defendant that if anything was to be settled it should be done at once. A solicitor was sent for to draw a will. The defendant instructed him before he saw the testator. When the will was drawn, which gave the bulk of his property to the defendant, but contained a legacy of \$1,000 to plaintiff, the solicitor read it over to the testator and asked him if he approved of it. He made a sign of dissent. The defendant tried to persuade the testator to give plaintiff \$1,000, but (as defendant said) he said \$10 was enough. In its altered form the will was signed. The evidence of various witnesses for the defence was conflicting as to the incidents which happened during this time and until the testator's decease; but while they all spoke of the testator's unwillingness to give the plaintiff more than \$10, there was no evidence other than that of the defendant of his desire to give the defendant the bulk of his property, or of any disposition of his property.

Held, reversing the judgment of Court below, that the second will could not be established on the uncorroborated evidence of the defendant, and the first will was declared to be the testator's last will.

Robinson, Q.C., for appeal.

S. H. Blake, Q.C., *Lash*, Q.C., and *Francis*, contra.

McKENZIE V. DWIGHT.*Deceit—N.-W. Mounted Police warrant—Assignment of—Representation as to right of holder.*

The Court being equally divided, the appeal was dismissed, and the judgment of the Court below, 2 O. R. 366, affirmed with costs.

McCarthy, Q.C., for the appellant.

McMichael, Q.C., and *Pearson*, for the respondent.

ELLIOTT V. BROWN.*Conveyance by married woman—Want of certificate of execution—Possession contrary to deed—R. S. O. ch. 128, secs. 13, 14.*

A married woman in 1834, by deed joining with her husband, purported to convey the east half of a lot to T. in fee simple, but the deed was void for want of a magistrate's certificate. T. never took possession, but in 1852

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[Chan. Div.]

conveyed to H., through whom the plaintiff claimed. Shortly after the conveyance to T., he told A. that he would not live on the land or have anything to do with it. A. then procured some one to look after it for her; and about sixteen years before this action two sons of A. went into possession of the west half of the lot on the understanding that they were to have the whole land, each paying her \$50 on account, but no deed was executed till 1875. They paid taxes on the whole lot, and cut timber at times on the east half. In 1871 E. having obtained a conveyance of the east half, had a line run between the east and west halves, and cut timber on the east half. An action of trespass was brought against him by A.'s sons, which he settled. The east half was neither cleared, fenced nor cultivated.

Held, reversing the judgment of the Court below,² O. R. 352, OSLER, J.A., dissenting, that the acts of A.'s sons upon the east half were such actual possession and enjoyment thereof within the meaning of the proviso at the end of sec. 13 of R. S. O., ch. 128, as to prevent that act from having the effect of making the defective deed valid.

Per OSLER, J.A.—The actual possession and enjoyment of the statute is such a possession as would suffice to bar the owner under the Statute of Limitations.

Dickson, Q.C., and *G. H. Watson*, for the appellant.

G. T. Blackstock, for respondent.

CHANCERY DIVISION.

Full Court.]

[Feb. 27.]

REAL ESTATE LOAN CO. V. YORKVILLE AND
VAUGHAN ROAD CO. ET AL.

Conveyance in fraud of creditor—"Creditors"—
Locus standi—13 Eliz. c. 5.

The plaintiffs sought to set aside a certain conveyance dated Feb. 27th, 1880, and made by the M. Society to the Y. Company, as executed in fraud of themselves as creditors.

It appeared that the plaintiffs had not recovered judgment for the debt, in respect of which they claimed to be creditors, until July 23rd, 1883, but that this was a judgment in an action brought for damages for certain mis-

representations made to them by the M. Society in September, 1879, which misrepresentations had induced the plaintiffs on that day to enter into a contract with the M. Society to purchase certain mortgages from them, and transfer certain shares of their capital stock to the M. Society, which stock they did not, however, actually transfer until after Feb. 27th, 1880.

Held, per BOYD, C., that the plaintiffs did not really become creditors of the M. Society until they recovered judgment, and it was illusory to endeavour to trace back the origin of this claim to the alleged misrepresentations, which were not acted upon until after the impeached conveyance, and whatever cause of action the plaintiffs then had they did not prosecute it, or become creditors in respect of it. The legal and only position of the plaintiffs was that of subsequent creditors, and it was not pretended that the conveyance was given with a view to defeat subsequent creditors, and failing that the plaintiffs had *no locus standi* to recover under 13 Eliz. c. 13, even if the impeached conveyance was held to be of a voluntary character as to which *quære*.

Held, per PROUDFOOT, J., that though an action for damages could not be brought until the damage accrued, yet the agreement of Sept., 1879, being based on misrepresentations of the M. Society, the plaintiffs' right dated from the agreement. It was not necessary for the plaintiffs to be creditors, it was sufficient for them to have a right of action, and the impeached conveyance being voluntary they were entitled to succeed.

The Court being divided, judgment of judge of first instance affirmed.

Lash, Q.C., and *A. Galt*, for appellants.

McMichael, Q.C., for respondents.

Divisional Court.]

[March 21]

RE FOX, AND THE SOUTH HALF OF LOT
NO. 1 IN THE 10TH CON. OF DOWNIE.

Quieting title—*Devise*—*Condition*—*Power of sale*.

The petitioner, in a quieting title application, claimed title as devisee under a will which contained the following provisions:—"Secondly, I devise to my son, J. F., the south half of Lot No. 1 in the 10th concession

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of the township of D., in the County of P., containing fifty acres more or less, but he is to be known as a sober, steady and industrious man. Thirdly, If, at any time during the period of five years after my death, it appears to my executors hereinafter named, that my said son, J., does not remain sober, I give them power to sell and dispose of the said property for such charitable purposes as to them shall seem meet."

Held, That the power of sale in the will was good, and that the certificate of title could only issue subject to such power of sale.

Clement, for the petitioner.

Divisional Court.]

[March 21.]

CANADIAN LAND, ETC., CO. v. TOWNSHIP OF DYSART.

Assessment—Jurisdiction of Court of Chancery to entertain action without appeal from Court of Revision.

On an appeal from the judgment of FERGUSON, J., in this action (reported *ante* p. 76) to the Divisional Court, the Court was divided and the judgment appealed from was therefore sustained.

Per BOYD, C.—The claim of the plaintiffs to the interference of this Court is not one of absolute right, but one resting on judicial discretion, and that discretion was rightly exercised in dismissing the action. The stipendiary magistrate has power to deal with the matters in question in the most ample manner. The statute intends that the value of lands shall be fixed by the municipal authorities, and not until all statutory means have been exhausted should recourse be had to this Court for relief. No authority has been cited for making this Court subsidiary to the appellate tribunal created by Parliament, and making it undertake the duty of disposing of appeals which could be effectually done by the stipendiary magistrate. As to costs the defendants are to blame for not having placed a demurrer on the record, and so had the preliminary question of law decided before the trial, and they should not be allowed to withhold a demurrer and reap large costs which might not have been incurred if they had by their pleadings notified the plaintiffs

that they would object to the plaintiffs' right to litigate. The costs of the motion for injunction should be given to the defendants, and further costs should be given thereafter as if the defendants had successfully demurred; and the costs of this appeal are to be given to the defendants.

Per PROUDFOOT, J.—The special act for the territorial division of Haliburton, R. S. O. c. 6, sec. 23, gives an appeal to the stipendiary magistrate against any *decision* of the Court of Revision. The action of the Court was a mere travesty of a judicial proceeding. The function of the Court was judicial, to hear and determine. The action of the Court in deciding in opposition to the only evidence given before them appears to establish that the whole was a fraudulent arrangement by the members of the Court of Revision. To give the stipendiary magistrate jurisdiction the Court of Revision must have given a *decision*. The admission that the action of the Court was fraudulent, in effect determines that there was no *decision*. A judgment is vitiated and void from the corrupt and fraudulent acts of the litigants, and a litigant has much more reason to complain of an unjust judge than he has of an unjust antagonist. It was not intended by the legislature that it should be the duty of the stipendiary magistrate to enquire into fraudulent proceedings of the Court of Revision, but to consider whether an honest decision was to be revised. In the case of an alleged fraudulent judgment the jurisdiction of the Superior Court is not taken away. The stipendiary magistrate's jurisdiction is confined to an appeal from a *decision*.

If this Court has jurisdiction, as it certainly has where the acts complained of are vitiated by fraud, we cannot refuse to entertain the suit because the plaintiffs may have another and perhaps a more convenient remedy.

I agree with the Chancellor as regards the costs.

S. H. Blake, Q.C., and Cassels, Q.C., for the plaintiffs.

McCarthy, Q.C., and Hudspeth, Q.C., for the defendants.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

PRACTICE.

Mr. Dalton, Q.C.]
Rose, J.][March 30.
[April 13.]

COOK ET AL. V. LEMIEUX.

*Action for recovery of land—Judgment—Rule
322 O. J. A.*

In an action for the recovery of land the plaintiffs moved, under Rule 322 O. J. A., for final judgment upon the pleadings, the depositions of the defendant, taken in his examination for discovery and upon an affidavit, verifying a lease of the land in question to the father and brother of the defendant.

The defendant in his examination admitted that his father told him there was a lease from the plaintiffs, but he did not admit any of the terms of it.

The lease put in and verified by affidavit was one from year to year, terminable at the end of any year on six months' notice, the lessees to pay all taxes and keep the fences in repair. It was not alleged that any notice to quit had been given, or that anything undertaken by the lessees had not been performed.

The defendant on his examination further admitted that he was in possession simply as his father's agent; that the title set up by his father was by possession, and that the only ground on which he expected to continue to hold was length of possession.

The plaintiffs sought to shew that the interest of the lessees under the lease was at an end, by proving from the defendant's examination that his father had disclaimed the title under the plaintiffs, and by the defendant's statement of defence in which he denied the plaintiffs' title.

Held, that much care must be taken in such cases not to take away the right of trial on *viva voce* evidence; that the plaintiffs' case was not conclusively made out, and the motion therefore failed.

Quære, whether the lease in question was a document that, under Rule 322 O. J. A., could be proved on this motion by an adverse affidavit without cross-examination?

A. H. Marsh, for the motion.

Watson, contra.

Rose, J.]

[April 13.]

NORTH V. FISHER.

Security for costs—Amount—Rule 431 O. J. A.

The defendant having obtained on *præcipe* an order for security for costs, a local judge allowed the plaintiff to pay into Court \$200 in satisfaction of it. This amount was afterwards increased to \$250, but the local judge refused to make an order for further security.

An appeal from the order of the local judge refusing to direct further security was dismissed, as the \$250 appeared to be sufficient.

But *quære* whether there is any power to make an order enabling a plaintiff to pay into Court a less sum than \$400 where the plaintiff has taken out a *præcipe* order under Rule 431 O. J. A?

F. Fitzgerald, for the appeal.

Holman, contra.

Rose, J.]

[April 14.]

THE UNION LOAN AND SAVINGS CO. V.
BOOMER.*Reference under sec. 47 O. J. A.—Jurisdiction of
Master in Chambers—Rule 323 O. J. A.*

The Master in Chambers made an order under sec. 47 O. J. A., referring to an official referee to enquire and report the amount in which the defendant was indebted to the plaintiffs under the mortgage in question.

On appeal the order of the Master was set aside on the ground that he had no jurisdiction, following *White v. Beemer*, 21 C. L. J 122, but an order was made under Rule 323 O. J. A. for a reference as upon a substantive motion. No costs of either motion were given to either party.

Clement, for the appeal.

Shepley, contra.

Mr. Dalton, Q.C.]

[April 18.]

ROSENHEIM V. SILLIMAN.

*Examination of witnesses before trial—Rule 285
O. J. A.*

A order was made under Rule 285 O. J. A. on the application of the plaintiff for the examination before the trial of the manager of the defendant's branch business at Toronto,

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

and the clerk in the Toronto office, who accepted, in the defendant's name, the bill of exchange sued on, where the defendant himself lived out of the jurisdiction.

Holman, for the plaintiff.

Ogden, for the defendant.

Mr. Dalton, Q.C.]

[April 18.]

GRANT V. MIDDLETON.

Notice of trial—Irregularity.

A notice of trial in an action brought in the Queen's Bench or Common Pleas Division given for a special sittings for the trial of actions in the Chancery Division is irregular and will be set aside.

Holman, for the defendant.

A. H. Meyers, for the plaintiff.

Boyd, C.]

[April 20.]

MASSE V. MASSE.

Transferring action to another division—Jury notice—Rule 545 O. J. A.

In an action for the recovery of land, the writ of summons issued compulsorily in the Chancery Division pursuant to Rule 545 O. J. A., and a jury notice was served by the defendant. A motion was made by the plaintiff to strike out the jury notice, and a cross-motion by the defendant to transfer the action to another division.

Held, that the object of Rule 545 being to equalize the business in all divisions of the High Court, an action will not now be transferred from one division to another except on very strong grounds. It was impossible to say on the facts disclosed that this action would be better tried by a jury than by a judge alone, and the jury notice should therefore be struck out and the action retained in the Chancery Division. The decision in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, is much affected by Rule 545.

J. C. Hamilton, for the plaintiff.

W. H. P. Clement, for the defendant.

Mr. Dalton, Q.C.]

[April 21.]

MACDONALD V. PIPER.

Costs—Action by solicitor against client—Reference to taxation—Rule 443 O. J. A.

In an action by a solicitor against his client to recover the amount of a bill of costs rendered, the defendant disputed the retainer, and the plaintiff moved for an order referring all the questions in the action and the taxation of the bill to one of the taxing officers.

Held, that by Rule 443 O. J. A. and Form 136, the former practice has been changed, and an order referring a bill of costs to a taxing officer should not direct the officer to do more than ascertain the proper amount of it.

Held, also, that an action having been brought on the bill in question it would not be proper to refer the question of liability which arises in the action to the decision of a taxing officer.

George Bell, for the motion.

Moffatt, contra.

Proudfoot, J.]

[April 22.]

MORTON V. HAMILTON PROVIDENT LOAN SOCIETY.

Costs—Scale of—Claim to equitable relief—Rule 515 O. J. A.

The plaintiff mortgaged certain lands to the defendants, and the mortgage becoming in default the defendants sold the lands under their power of sale, and afterwards rendered a statement claiming \$182.61, as due to them under their mortgage in addition to the amount derived from the sale, and such amounts as had been paid by the plaintiff before the mortgage became in default.

The plaintiff brought this action claiming that the defendants had received much more than they were entitled to, and asked to have account taken of the sums due on the mortgage and of the sums received by the defendants, and that the defendants might be declared trustees of the plaintiff in regard to that money, and might be ordered to account for it.

The action was referred to a Master, who reported that he had taken the accounts, and that he found a balance due to the plaintiff of \$123.27.

Prac.]

NOTES OF CANADIAN CASES—BOOK REVIEWS.

The judgment on further directions ordered the defendants to pay to the plaintiff the amount found due with costs.

The taxing officer taxed the costs on the higher scale.

Held, that the defendants' liability was not a legal one as for a money demand; but the claim was for equitable relief, and the action could not have been brought in the County Court, nor was it a case under Rule 515 O. J. A., for costs on the lower scale, for the amount involved was \$305.88 (\$182.61 plus \$123.27), a sum beyond the former equitable jurisdiction of the County Court, and therefore the taxing officer was right in taxing the costs on the higher scale.

Muir, for the defendants.

Watson, for the plaintiff.

Boyd, C.]

[April 22.

WALKER v. WALKER.

Interim alimony—De facto marriage denied.

Upon an application for *interim* alimony the plaintiff swore that she was married to the defendant, and gave the time, place and circumstances of the alleged marriage. The defendant denied and brought confirmatory evidence to support his denial that the marriage was celebrated at the time and in the manner and place alleged by the plaintiff; but he did not deny the existence of facts deposed to by the plaintiff, from which a marriage *de facto* might be inferred from conduct and reputation. Under these circumstances the order of a local Master, awarding the plaintiff *interim* alimony, was affirmed.

Held, that the principle which underlies all the decisions is that the allotment of alimony *pendente lite* depends upon the marital relationship of the parties existing *de facto*. The Court exercises a discretion in granting or withholding alimony *pendente lite* which is regulated by the circumstances of each case, and the defendant by his own act and conduct having clothed the plaintiff with the reputation of being his wife, the decision of the Master should not be interfered with.

Lash, Q.C. for the appeal.

Hoyles, contra.

BOOK REVIEWS.

THE ELECTOR'S POLITICAL CATECHISM. Compiled by Richard John Wicksteed (of the Law Department, House of Commons, Ottawa). Ottawa: Citizen Printing and Publishing Company, 1885.

This brochure of Mr. R. J. Wicksteed was issued some little time ago, and we crave his pardon for not noticing it before. It is intended to try to give electors a view of their position, duties and responsibilities as citizens of Canada. It is, speaking generally, an effort towards giving men thoughts beyond party, shaking off the abominable tyranny of partyism, and freeing them not only from those galling chains, but from the equally adamant bonds of self-interest; an effort to clear away the mist obscuring the sight of this true heritage of freedom, whereby they can become free and strong to do the right without fear from without or reproaches from within. His aim is high and we shall not (for fear a doubt might help to mar the good work) question his statement, "that it ought not to be very difficult to elevate our elector and legislator to the *judge* standard, and to bring about a recognition of the principle that a vote at the polls or in Parliament influenced by undue considerations is as much an act of immorality as a corrupt decision by a judge."

The writer claims that what he deprecates must have its cause in the ignorance of the electors as to the constitution, and of their duties and responsibilities as citizens. His thoughts are large and high (not claiming them to be original, for he gives a list of his authorities in an appendix), though, in the form in which expressed, quaintly reminding us of childhood's days when we were taught with weary labour the old Church Catechism. Let us give some extracts:—

QUESTION. What is your name and state of life?

ANSWER. I am A. B., an elector of the Dominion of Canada, a colony of the United Kingdom of Great Britain and Ireland, and a subject of Her Britannic Majesty.

Q. What privileges do you enjoy by being an elector of Canada?

A. By being an elector of Canada, I am a greater man in my civil capacity than the greatest subject of an arbitrary prince; because I am governed by laws to which I give my consent—and my life, liberty or goods cannot be taken from me but according to these laws. I am a freeman.

Q. Who gave you this liberty?

A. No man gave it to me. Liberty is the natural right of every human creature; he is born to the exercise of it as soon as he has attained to that of his reason. But that my liberty is preserved to me, when lost to a great part of mankind, is owing, under God, to the wisdom and valour of my ancestors.

BOOK REVIEWS—CORRESPONDENCE.

Q. Wherein does this liberty, which you enjoy, consist?

A. In laws made by the consent of the people, and the due execution of those laws. I am free not from the law but by the law.

Q. Rehearse the articles of your political creed, as a citizen of Canada?

A. I believe that the supreme or legislative power of this Dominion, in the subject matters over which it has jurisdiction, resides in the Queen, the Senate and the Commons; that Her Majesty Queen Victoria, is Sovereign or Supreme Executor of the law, to whom, upon that account, all loyalty is due; that each of the three branches of the Legislature is endowed with its particular rights and offices; that the Queen, by her royal prerogative, has the power of determining the time and place of meeting of Parliaments; that the consent of the Queen—that is, of the Governor-General, acting on behalf and in the name of Her Majesty—the Senate and the Commons is necessary to the enactment of a law, and that all the three make but one lawgiver; that as to the freedom of consent in the making of laws, these three powers are independent; and that each and all the three are bound to observe the laws that are made.

Q. What are the duties of your station?

A. To endeavour, so far as I am able, to preserve the public tranquillity, and, as I am an elector, to give my vote for the candidate whom I judge most worthy to serve his country, for, if from any partial motive I should give my vote for one unworthy, I should think myself justly chargeable with his guilt.

Q. You have perhaps but one vote in two thousand, and the member perhaps one of two hundred more—then your share of the guilt is but small?

A. As he who assists at a murder is guilty of murder, so he who acts the lowest part in the enslaving of his country is guilty of a much greater crime than murder.

Q. Is enslaving one's country a greater crime than murder?

A. Yes; inasmuch as the murder of human nature is a greater crime than the murder of a human creature, or as he who debases and renders miserable the mass of mankind is more wicked than he who cuts off an individual.

Q. Is it not lawful, then, to take a bribe from a person otherwise worthy to serve his country?

A. No more than for a judge to take a bribe for a righteous sentence; nor is it any more lawful to corrupt than to commit evil that good may come of it. Corruption converts a good action into wickedness. Bribery of all sorts is contrary to the law of God; it is a heinous sin, often punished with the severest judgments; and is, besides, the greatest folly and madness.

Q. How is it contrary to the law of God?

A. The law of God says expressly, "Thou shalt not wrest judgment; thou shalt not take a gift." As to the wicked it says, "His right hand is full of bribes;" the righteous "shaketh his hands from holding a bribe;" "that God shall destroy the tabernacle of bribery," etc.

Q. What do you think of those who are bribed by gluttony or drunkenness?

A. That they are viler than Esau, who sold his birth-right for a mess of pottage.

Q. Why is my taking a bribe at an election folly or madness?

A. Because I must refund tenfold in taxes what I take as a bribe, and the member who bought me has a fair pretext to sell me; nor can I in such a case have any just cause for complaint.

Q. Who is most likely to take a bribe?

A. He who offers one.

Q. Who is likely to be frugal of the people's money?

A. He who puts none of it in his own pocket.

While some might cavil at some of the propositions laid down in Mr. Wicksteed's Catechism, it would be well that it should be widely read as well by the juveniles who are to be the men of the future as the children of larger growth, who are ignorant of what law and freedom really mean.

CORRESPONDENCE.

RECENT LEGISLATION.

To the Editor of the LAW JOURNAL,

SIR,—I have just been looking over the April 15th number of the C. L. J., and notice the comments on the O. J. Act, 1885, in which reference is made to a case or two aimed at by the Act. My vanity prompts me to tell you that two other cases are distinctly aimed at in two other Acts of the same session. Cap. 26 sec. 2 is intended to set at rest a much vexed question under our R. S. O. cap. 118, namely, whether an assignment which has the effect of hindering or delaying, etc., a creditor, must be taken to have been executed with that intent. This point was decided in the affirmative by the C. P. and Court of Appeal in the case of *McLean v. Garland*, which was recently argued before the Supreme Court. Then cap. 27 aims at another decision of *Re Lyons*.

I remain, Sir,

Your obedient servant,

A BARRISTER.

ENFORCING JUDGMENTS OF FOREIGN
BRITISH COURTS.

SIR,—The suggestion that some method of procedure should be devised whereby the judgments of the Queen's Courts in one part of her empire may be enforced in the Courts of any other part is a very reasonable one, and well worthy of consideration.

With a view to carrying out such a scheme of judicial reciprocity, I would suggest that it

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might be provided that upon the filing of a duly authenticated copy of the judgment of any Court of Her Majesty's Dominions in any other Court in any other part of her dominions, having jurisdiction to entertain an action upon such judgment, the judgment shall become a judgment of the latter Court, and enforceable by process to be issued therefrom, as if originally recovered therein.

H.

OSGOODE LITERARY AND LEGAL
SOCIETY.

THE annual dinner of this Society was held on the 22nd ult., in the new hall of Osgoode, which, by special leave of the Benchers, was given to the Society for the purpose.

The chair was taken by the President of the Society, Mr. G. T. Blackstock. Amongst the guests were the Lieutenant-Governor, Archbishop Lynch, the Bishop of Toronto, Chief Justice Hagarty, the Chancellor, Hon. Mr. Justice Burton, Hon. Mr. Justice Patterson, the Attorney-General, Sheriff Jarvis, Judge McDougall, Christopher Robinson, Q.C., S. H. Blake, Q.C., James Maclellan, Q.C., etc.

The arrangements were all that could have been desired, reflecting great credit on the committee, which consisted of Messrs. J. A. Mackintosh, A. Green, A. B. Cox, D. J. Symons, J. A. Carson, A. H. Lefroy and W. E. Raney.

The usual toasts were duly proposed, and received with wonted enthusiasm.

The Lieutenant-Governor, in the course of his reply to the toast of the Governor-General and the Lieutenant-Governor, related an incident apropos of the recent call to arms. His father, the then Chief Justice of Upper Canada, as, of course, all know, shouldered his musket as a private at the time of the Rebellion in 1837. Amongst the volunteers of that day was the present Premier of Canada. He had a case ripe for hearing before the Chief, and meeting the opposing counsel in the street was told that the latter had just argued his side of the case before the Chief Justice. Mr. Macdonald expressed doubt and surprise, as only a few days before he had met the Chief with his musket in his hand. When convinced that it was as stated he rushed off to Osgoode Hall and into Court, and argued his case before his fellow-soldier, none the less well because he had his uniform on and his musket beside him. The Lieutenant-Governor, in the course of his remarks, emphasized a suggestion that it would be well to have portraits of the various Chief Justices of Upper Canada obtained and hung on the walls of the hall, and so

complete the gallery begun by the portrait of Chief Justice Osgoode.

The Attorney-General replied to the toast "Canada," which was well given by Mr. Raney, the Vice-President of the Society. Mr. Mowat referred to various thoughts which have been expressed as to the future of the Dominion, which elicited a response from the meeting that those present were not favourable either to annexation or to independence, and he himself rejoiced in the fact that devotion to the interest of Canada was consistent with continued connection with the mother country.

The toast of "The Army and Navy, and Men at the Front" was eloquently proposed by Mr. A. H. Lefroy, and responded to by Mr. W. B. McMurich, and was, of course, received with hearty cheers.

Mr. Christopher Robinson, who proposed "The Bench," was, on rising, received with an ovation which showed very clearly the feeling of respect, admiration and regard which his brethren have for so worthy a successor of his illustrious father. After suggesting that it was appropriate that one who had "talked the judges to death for nearly thirty years should now propose their health"; he referred in a most happy way to the traditions of the Bench and Bar of Ontario, which, for now nearly a century of our judicial history, was unbroken in their harmony and kindly feeling. His word of counsel to the youngsters was that by no act of theirs should this tradition ever be broken.

The Chief Justice responded in one of his witty and humorous speeches. He playfully alluded to the time when he had for the long and prosperous period of ten days held the reins of government in Ontario, during which time amongst the exports he noticed that there were some nineteen attorneys sent to Winnipeg, as was shewn in a return contained in one of the schedules of the Nuisances Removal Act, (this, he remarked, was a very good joke for the Court of Appeal, where anything in the nature of a witticism was always promptly frowned down). Although ably supported by the Attorney-General he at length succumbed to the arduous duties of the office; the last straw was his being compelled to join in the responsible task of appointing of Division Court Bailiffs. However, he appointed men who, as he was informed by his constitutional advisers, were "of good character, and their politics unexceptionable." The Chief Justice, in speaking of the good feeling which has always characterized the relations between the Bench and Bar of Ontario, said it was due to a great extent to the example of such men as the Mansfield of Canada, Sir John Beverley Robinson.

OSGOOD HALL LEGAL AND LITERARY SOCIETY DINNER—LAW STUDENTS' DEPARTMENT.

and the other distinguished men whose names were so well known to all present. He paid a compliment to the Bar in their presentation of their cases, but divided those who sometimes caused weariness to the Bench into two classes, first, those who laboriously sought to prove that two and two make four, and those who endeavoured to show that the same numbers make five.

The Chancellor also replied in a speech replete with anecdote and illustration, containing some admirable thoughts for those beginning professional life; that their profession was not one of merchandise, but (subject to their duty to the Court) one of unselfish devotion by the lawyer to the interests of his client. To the student he said that difficulties should be faced and overcome and not slurred over. When alluding to Oliver Cromwell's saying that the law was a "tortuous and ungodly jumble" some one at the table caused a laugh by the loud aside of "good old Oliver," whereupon the Chancellor, with ready wit, retorted "but our Oliver has got rid of the jumble."

"The Bar" was neatly proposed by Mr. Bowes, and answered by Mr. S. H. Blake, Q.C. who, after referring to the legislation of the last few years, spoke of an independent Bar as one of the safeguards of the people. As to the code of ethics their education make it a necessity that they should as a class stand on a higher level than any other class of men engaged in the vocations of a business life.

Mr. A. B. Cox made a very good speech on behalf of the Junior Bar, indulging in a little pleasant banter in reference to legislation affecting the profession, likening the action of the Attorney-General, who when asked to repress unlicensed conveyancers replied by passing the Torrens Act, to the action of the Fiji king who, when a troublesome petition was presented to him, got rid of the difficulty by chopping off the heads of the petitioners.

Mr. Greer, in a well put together and well-delivered speech, proposed the health of the President.

Mr. Blackstock as usual spoke well both as to matter and manner. He claimed an increased measure of support for the Osgoode Literary and Legal Society, which was doing a quiet but very useful work among the young men in the profession, that it had not received proper encouragement from the older members of the profession, but hoped that this most successful gathering was an augury of better things. He spoke of the frequent neglect by masters of the wants of their students both in a social and educational aspect, a wrong which it was only right should be remedied without delay. He alluded to the cry of the hour for decentraliza-

tion, and strongly deprecated any further move in that direction. He instanced the state of things in the Province of Quebec and some of the United States as to the effect of splitting up the judiciary, and warned those who were agitating to this end that they were doing a serious injury to the Bench, the Bar and the State.

After a few more toasts this most successful and pleasant entertainment was brought to a close.

LAW STUDENTS' DEPARTMENT.

EXAMINATION QUESTIONS.

FIRST INTERMEDIATE.—HONORS.

ANSON ON CONTRACTS.

1. Indicate some of the consequences of the *peculiar* favour with which the idea of consideration as a necessary element of contract has been treated in *Equity*.
2. State and exemplify the position of parties who have entered into a contract specified in the fourth section of the Statute of Frauds, but have not complied with its provisions.
3. "The very nature of a corporation imposes some necessary restrictions upon its contractual power, and the terms of its incorporation may impose others." Illustrate what is meant in this quotation by examples.
4. Point out any difference in the rules of *Equity* respecting the right to rescind contracts entered into under (a) Undue Influence; and the rules which apply to Fraud.
5. "A contract may be discharged by express agreement that it shall no longer bind either party." Explain this quotation as fully as you can.
6. What are the consequent rights to one party to a contract when the other in the course of the performance of the contract deliberately refuses performance of his part?
7. What is the effect of alteration by addition or erasure of a written contract? Answer fully.

REAL PROPERTY.—HONORS.

1. Explain why it is that there are no manors in Ontario.
2. What estate does a man take under a grant to him and his heirs male? Why?
3. What is meant by a resulting use?

LAW STUDENTS' DEPARTMENT—FLOTSAM AND JETSAM.

4. It is said that powers cannot be engrafted upon a bargain and sale. Explain this.
5. What is the difference between a surrender and a release.
6. How does a court of equity regard a mortgage debt, and why?
7. What was, and what is now, the effect of the words *exchange* and *grant* respectively in a deed?

BROOM'S COMMON LAW AND O'SULLIVAN'S GOVERNMENT IN CANADA.—HONORS.

1. Give two examples to illustrate: (a) the class of cases in which privity is necessary to support an action *ex delicto*: (b) the class of cases in which privity is not necessary to support such an action.
2. Explain the difference between the rights which a proprietor of land has in reference to *natural* and *artificial* watercourses flowing through his land.
3. Give an example in which damages sustained by one man, through the tort of another, cannot be recovered, because they are *too remote*.
5. Explain and illustrate by examples, the meaning of *contributory negligence*.
5. Explain and illustrate by examples, the difference between *larceny* and *embezzlement*.
6. What effect has the want of *jurisdiction* on the liability of a magistrate for the imprisonment of a person by his warrant or order?
7. Explain briefly and generally what persons are *British subjects* and what are *aliens*?

FLOTSAM AND JETSAM.

MANY a man who has gone into Court has arrived at the settled conviction that he was an ass. He is not therefore startled at hearing that the Supreme Court of Texas has decided that a jackass is a horse—at least so far as the exemption law is concerned.

THE *Central Law Journal*, with a fine sense of the fitness of things, has opened a new department under the head of "Jetsam and Flotsam." Why the words are tumbled heels over head in this fashion does not appear. Possibly, it might be thought that to reverse the order of the words would infringe our patent in the time-honoured title that appears above.

It has recently been decided by the Supreme Court of the United States in *Chicago, Milwaukee and St. Paul Railway Co. v. Ross*, that the conductor of a railway freight train is not a fellow-servant with the engineer in charge of its engine, within the meaning of the rule which exempts a master from liability for the negligence of his servant, whereby another servant engaged in the same employment is injured—but such conductor is the vice-principal of the company.

A CORRESPONDENT of the *Central Law Journal* thus writes to the editor imploring him if he has any influence with the English Court of Appeal to induce them to appoint one judge to deliver the opinion of the Court. "It is," he very correctly remarks, "an intolerable nuisance, after one judge has exhausted the case, to have another take it up, and go over all the points the first has made, and add a word or two by way of illustration, and agree with the first. It gets worse and worse when a third and fourth go through this same formula. We have to pay for these tautological reports. Our periodicals follow suit in this stupidity. They usually publish the opinions of all the judges, which are generally as much alike as two peas. Life is too short to read all this matter." We have before now called attention to this evil in this Province. Our contemporary uses the occasion to make some jocular remarks. After doubting its ability to do any good in the premises, the editor proceeds thus:—"Those learned judges are very conservative. It took them some two years to find out the whence of a draught of air in the Law Courts building, which brought constant sneezes to the judicial nose. Searches were made again and again, like the annual searches under the Parliament House for Guy Fawkes' barrels of gunpowder; when, lo and behold, it was an open window in the very rear of the judicial seat! After mature deliberation, said window has been (officially) closed. Thus the learned judges of Her Majesty's Courts proceed with deliberation. They hear (and feel) before they decide."

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DIARY FOR MAY.

17. Sun.....1st Sunday after Ascension. Cameron, C.J., C.
P., 1884. D. A. Macdonald, Lieut.-Gov. Ont.,
1875.
18. Mon.....Easter Sitting of Common Law Divisions, H.C.
J. begin.
21. Thur.....Confederation proclaimed, 1867.
22. Fri.....Lord Dufferin, Gov.-Gen. 1872.
24. Sun.....2nd Sunday after Ascension. Queen Victoria
born, 1819. Ferguson, V.-C., 1881.
25. Mon.....Princess Helena born, 1846.
30. Sat.....Proudfoot, V.-C., 1874.
31. Sun.....Trinity Sunday. Parliament first met at Toronto,
1797.

TORONTO, MAY 15, 1885.

SOME interesting statistics were unearthed in the Senate of the Dominion during a recent debate on the subject of legislation in the Senate. The following is an extract from the speech of an honourable member who was urging the desirability of initiating, as far as possible, private bills in the upper chamber:—

Since Confederation the Dominion Parliament has passed more than 1,400 Acts, of which 650 have been for private purposes, such as the incorporation of railway, banking, loan, insurance and other companies. The Legislatures of the different Provinces, since Confederation, up to 1884, have passed the following number of Acts:—Ontario, 1,358; Quebec, 1,105; Nova Scotia, 1,414; New Brunswick, 1,302; Prince Edward Island, since 1873, since it came into the Union, 313; Manitoba, 477; British Columbia, 324; and of those Acts 31 have been disallowed. In all 6,293 Acts have been passed, and but 31 have been disallowed by the Dominion Government, namely:—Ontario, 5; Quebec, 2; Nova Scotia 5; New Brunswick, none; Prince Edward Island, none; Manitoba, 7; and British Columbia, 12. It shows, therefore, I think most conclusively that the working of the system under which we are confederated has been upon the whole greatly harmonious, and that there has been no friction in the machinery which is worthy of notice. I think it is an important item in considering the effect of the important clauses by which special subjects of legislation are assigned

to the Provinces, where one might suppose that there sometimes would be a straining of the relations between the Provinces and the Dominion, and where it has been asserted in some quarters that there has been a straining of such relations. It is most remarkable to notice how few Acts have been passed in any Province that have been objected to by the Dominion Government; and when we consider that the terms of Confederation giving to the Provinces special subjects of legislation, reserved not only specified legislative powers for the Dominion, but gave it powers over all subjects which were not specially given to the Provinces, it is marvellous that the Provinces in their legislation have kept so closely within constitutional limits, and so closely confined themselves to the exercise of the powers which were given them by the constitution as only to have exceeded them in this vast amount of legislation—in the opinion of those who are charged with the revision of their Acts—to the extent which I have stated here. I think it is a matter for congratulation with every one who wishes the confederation of these Provinces well, and who has a desire to perpetuate it, that so far there has been so little friction in the movements of the machinery.

OUR ENGLISH LETTER.

THE assizes are now in full swing; or, as the organs of popular opinion have it, the circuit nuisance has set in with its usual severity. In the matter of gaol deliveries the system of grouped assizes is, I think, exceptionally unfair to prisoners, in a manner which may best be shown by concrete example. Two or three days ago your correspondent heard a boy tried for burglary, of which the net results were five shillings in copper, a bottle of rum and nine months' imprisonment. The evidence consisted in the possession of about five shillings in copper, and in intoxication. The prisoner asserted that the vast wealth had been

OUR ENGLISH LETTER.

the result, and the drunken condition an incident of an all night sitting at the card table with three militiamen. The first jury disagreed. Field, J., tried the prisoner a second time, and having obtained a verdict, rated him soundly as a liar. Now the lad named the very men with whom he had been playing, but they were forty miles off, and there was no opportunity of investigating his story, and it seemed doubtful to your correspondent as an impartial spectator, whether, after all said and done, he might not have been absolutely innocent; and at any rate his story had not been investigated. Yet his offence, although technically described as burglary, was of the most trivial nature, apart from the breaking and entering, and presented no feature which could not have been easily dealt with by a stipendiary magistrate. This brings me to the second count against gaol deliveries, which is their expense. I have just been through a whole circuit at which not more than three serious cases have been tried, the remainder being purely sessions cases. In fact, a gaol delivery is neither fish, flesh, fowl nor good red herring; it does not serve the needs of provincial towns, and it is, by dint of causing a judicial famine, an endless nuisance to metropolitan suitors.

The current sittings did not open in an exciting manner. It was hardly possible that they should, seeing that not more than three common law judges can sit simultaneously, and that Mrs. Weldon is undergoing luxurious discipline in Holloway gaol as a first-class misdemeanant. In passing it may be observed that this good lady has met with severe treatment, and that the general opinion is that her sentence would have been a good deal shorter if her character as a litigant had not been as well known as it was. However, now that she is away there is some chance of progress, the more so as there

is but one sensational case in the legal programme at present. That is *Adams v. Coleridge*, for the second time of asking, and I am happy to be able to state that Mr. Adams, having employed counsel, is likely to conduct his case in a more creditable manner than heretofore. It is rumoured, however, that Lord Coleridge is filled with melancholy forebodings, and that he has been heard to describe himself as a poor broken-down old man.

The retrospect is a painful one for lawyers. In Lord O'Hagan the profession lost a man universally popular and of brilliant ability. In Lord Cairns Lincoln's Inn mourns the most logical of her sons, and the Conservative party deplores a competent and convincing leader. Both were brilliant examples of the best types of the Irish legal mind, the former a brilliant and impassioned orator, the latter a past-master of rhetoric and logic. Nor, passing away from personal regrets, are the prospects of the profession good. Work, indeed, is slightly more abundant than it has been for the last year or two, but professional morality shows signs of deterioration. Men have always been known to be prepared to work for nothing, but the secret is rather more open than it used to be. Further, a good many barristers find themselves unexpectedly and quite involuntarily in the position of having done their work for nothing. The course of things is simple. A client comes once, twice, or even three times; at last the advocate asks for his fees; the result is that he loses a client and does not recover his money. It may be said that barristers in this position ought to report the matter to the Incorporated Law Society, and this is sometimes done by men of established position, but very little advantage ever accrues, and one cannot help thinking that when fraudulent solicitors are brought before the Court they are treated with exceptional lenity.

OUR ENGLISH LETTER.

This mention of fraudulent solicitors brings me to one of the leading popular topics of the day. Probably no body of men in the world with equal opportunities is as honest as the great class of solicitors. Their probity is so notorious that they are trusted with implicit confidence. It follows, therefore, that when they yield to temptation they are able to work endless havoc, and having worked it to escape scatheless. They fly to Spain or to the States and enjoy themselves, while their victims pass in melancholy procession before Mr. Justice Cave. Now, we have extradition treaties with both these nations. The one with the States is practically useless, for it covers four offences only, to wit, murder, arson, piracy and robbery. The one with Spain is a dead letter. Lord E. Fitzmaurice says that it dates from the year 1878, and that it is in force now. Nominally it may be; practically it is useless, for Mr. Ben Davis, the latest disgrace to the legal profession, is at this moment known to be luxuriating in Spain. Surely it is time that there was an end of these things? For my own part I confess to an exceedingly strong view upon the subject which would include the extradition of political offenders. There are infinite disadvantages in being the Athens of the world. England has filled that position for many centuries, and gained the practical benefit of harbouring the Spitalfields weavers, and the honour and glory of protecting the heroic Kossuth. But political conspirators are not all Kossuths; on the contrary, they are exceedingly apt to be vulgar persons full of murderous designs; and we feel this when justice fails to lay her hands upon the men who direct the efforts of the dynamitards.

The Infants Bill, which is now undergoing critical discussion in the House of Lords, is strongly symbolical of the tendencies of the age. Nothing is more

foreign to the spirit of the times than the *patria potestas* of the Romans, and in our fear of its injustice we show an inclination to the other extreme. Briefly stated, one of the effects of the Infants Bill, if it were not modified, would be that a widower, in his desire to direct the education of his children, might be thwarted by the wishes of his deceased wife. Precisely the same principle is inherent in the Married Women's Property Act which, in taking away women from the possibilities of injustice, inflicts undue hardship upon men.

The cry for more judges continues to increase in bitterness, and there is no sufficient reason for the obstinate silence with which it is received. One cause of the silence is to be found in the apathy which lawyers in Parliament invariably display whenever legal questions come to the fore; an apathy which, discreditable as it is, will never be removed until we obtain some form of class representation. Why should we not have a member for the Bar and for solicitors, as well as representatives of the Universities? Are barristers and solicitors less intelligent than the country parsons? I trow not; but outside the House of Lords there is not a statesman who cares a particle for the interests of the profession.

THE TEMPLE OF JUSTICE IN ENGLAND.

SELECTIONS.

THE TEMPLE OF JUSTICE IN ENGLAND.

FEW persons appear to recognize the exquisitely allegorical character of our New Law Courts. On arriving at the principal entrance, the would-be litigant immediately experiences a sensation of being "stranded" (this immodest quip is inevitable) upon a bleak, stony, and inhospitable shore. In front and on either hand of him there stretches the most irregular, heterogeneous, complex, monstrous and irreconcilable aggregation of ins and outs conceivable by the mind of man. Yet is the complexity of the exterior "a light affliction" compared to the windings, passages, labyrinths and mazes of the still more wonderful interior.

Porta adversa ingens, solidoque adamante columnæ. The main portal is wide—wide is the gate and broad is the way that leadeth unto litigation. It is, moreover, cavernous, and thrust backward and inward after the manner of the mouth of the octopus. It suggests the abandonment of hope and umbrellas upon the very threshold.

Cardine sacræ panduntur portæ. The great gate of this great Temple leads directly to the Great Hall. Here again all is full of allegory. How symbolic of our whole legal system are the extreme narrowness and interminable length of this stately chamber! It is full of detail, it is costly, it is of the smallest possible use. Most persons on gaining access to the hall expect to find an easy approach to the courts by turning to the right or left. Such expectations are vain. If the unwary one ventures through the arches on either hand, he plunges straightway into total darkness, falls up the hardest of stone stairs, and wanders disconsolate in the very corridors of time.

Inextricabilis error! No, the way to approach the actual courts themselves is through catacombs at the further end of the hall, the which catacombs are dim, mysterious, and full of unexpected ramifications. It is alleged that handsome

young barristers are wont to bring their pretty cousins down into these gloomy vaults for reasons which older heads do not readily understand, there being little to see and great difficulties in the way of being seen. Perhaps their impressions of the mysteries of the law would not be complete without this adventurous initiation.

The question now is—*superas evadere ad auras.* Hereabout is a choice of doors, which lead upwards to the Court floor above. Let us choose the one at the foot of a spiral stone staircase possessing the peculiarity of enfolding another and smaller staircase within its corkscrew turnings—*sinu labens circumvenit atro*; a detail again highly symbolic, signifying the delight of the legal mind in twistings within twistings, and darkness over all. Now, as touching the Courts proper, to which we have emerged on the upper floor, they all possess certain features in common. First and foremost they are not in the least like what Courts ought to be. They rather resemble the chapels which border the larger cathedrals. They are small, they are dark, they are draughty, they are incomprehensibly inconvenient. The winds of heaven compete briskly for possession of them, and perfumes of all sorts, excepting those of Araby the blest, delight to linger within the jurisdiction. We anticipate, however, that Baron Huddleston will one day commit them, if they unwarily let him catch them. On ordinary days it is possible to wriggle into them at the trifling sacrifice of the integrity of one's hat, coat-tails, or such like little outlying appurtenances, together with a proportionate sweetening of temper; but on Motion days he who aspires to present himself before Her Majesty's Judges must be content to carry life itself in his hand. It is a crush as if the Arab spearmen were upon us, and we were in momentary expectation of being crumpled up.

Before leaving the Court corridors let us take note of some of the parties to the contests going on, their witnesses and friends. Behold the plaintiff, who has won when he ought to have lost, and is half exultant, half frightened, being somewhat uncertain as to the Judge's direction in the matter of costs. Observe the hopeless astonishment of the defendant in the

THE TEMPLE OF JUSTICE IN ENGLAND—SHAKESPEARE AS A LAWYER.

same case. Observe again the oldest inhabitant in the boundary case mumbling the corner of a slab of seed-cake, and recounting how he "guv them 'ere lawyers as good as they sent." Watch the groom in the running-down action flirting with the highly confidential maid in the divorce suit. See the good-natured young man in the "light and air" proceedings, exhibiting his model to an apoplectic baby under pretence of its being a kind of glorified doll's house, and confess that here is the making of many books.

Of the gigantic honey-combs of offices set apart for chief clerks, registrars, masters and others, we have now no space to speak. They consist of almost countless rooms and corridors of appalling length, some of which are yet unexplored. There is, moreover, a sense of mystery about them, heightened by dreadful rumours to the effect that adventurous messengers, wandering down these dismal alleys and blazing the walls as they go, have come upon the bleaching skeletons of solicitors, who, losing all clue to the bright and cheerful outer world, have perished miserably of cold and hunger, starved to death in their own anthill.

Sed jam age, carpe viam et euseptum pre-fice munus. Acceleremus. Gentle reader, come ye out into the light; for, though it be a little trying to the eyes at first, it will never do for us to stop here and learn to love darkness rather than light. *Discite iustitiam moniti.*

Some who are superstitious above all things have asked us what is the best day on which to go to law? We answer unhesitatingly, the first fine Monday in every alternate month which happens to fall on a Saint's day, and contemporaneously with a full moon, provided always that no sittings are going on, or vacations, or holidays and that such Monday does not fall on a day on which the British Museum, or National Gallery, or Sir John Soane's Museum is closed.—*Verb. sap.—Pump Court.*

SHAKESPEARE AS A LAWYER.

SOME years ago an article appeared in one of our leading magazines, the main purport of which was to prove that Shakespeare had gained his knowledge of law by serving as an attorney's clerk. However improbable and unacceptable such a conclusion may appear, the writer's argument looks comparatively sensible, when set side by side with the egregious fallacies propounded by certain doctors of divinity to prove that Shakespeare was a believer in this or that particular form of faith or grace.

Shakespeare, like his old friend Jack Falstaff, knew so many wonderful things "by instinct:" he worked so much away from himself, and in a world of so much mental activity, that it is idle and futile to endeavour to learn or deduce anything of his own life and personality from his works, which reflect only the lives and personalities of others. Still, his acquaintance with and knowledge of old English law and the legal life of his time are oftentimes so minute and so accurate that, if he were not Shakespeare, one might safely conclude that he must have had a wider experience of the ins and outs of court than an ordinary man would be likely to acquire in the ordinary run of life.

The gravedigger's scene in Hamlet affords a notable instance of Shakespeare's wonderful felicity in adapting to his work whatever came to his hand. The discussion which the clowns hold on the right of Ophelia to be "buried in Christian burial" is really a burlesque of an actual trial which took place just half a century before Hamlet was written.

On the accession of Mary Tudor, Sir James Hales, a puisne Judge of the Common Pleas, was indicted for having taken part in the plot to exclude Mary from the crown by placing Lady Jane Grey on the throne. However, he was shortly afterwards pardoned and released, but not before he had been frightened sufficiently to drive him out of his mind. After his release he attempted suicide by stabbing himself with a penknife; but this proving unsuccessful, he took the more effectual course of walking into a river. At the "crown's" inquest a verdict of *felo de se* was returned, and, according to the custom of the time, his body was to be buried

SHAKESPEARE AS A LAWYER.

at a cross-road, with a stake thrust through it, and all his goods and chattels were to be confiscated to the crown.

At this time Sir James Hales was holding a long lease of a large estate in Kent, which, at his death, was seized by the crown and handed over to Cyriac Petit. Upon Cyriac Petit taking possession, Lady Margaret, the widow of Sir James, brought an action to recover the estate; and then arose the odd question whether Sir James could be said to have committed suicide while he was alive. For if the confiscation did not take place in his lifetime, the widow was entitled to the estate.

The plaintiff's counsel argued that suicide was the killing of oneself, and, being the *killing*, it could not possibly be completed in one's lifetime; for while a man was alive he was not *killed*, and the moment he was dead the estate vested in his widow. "The felony of the husband shall not take away her title by survivorship, for in this manner of felony two things are to be considered—first, the cause of the death; secondly, the death ensuing the cause; and these two make the felony, and without both of them the felony is not consummate. And the cause of the death is the act done in the party's lifetime, which makes the death to follow. And the act which brought on the death was the throwing himself voluntary into the water, for this was the cause of his death. And if a man kills himself by a wound which he gives himself with a knife, or if he hangs himself, as the wound or the hanging, which is the act done in the party's life-time which is the cause of his death, so is the throwing himself into the water here. Forasmuch as he cannot be attainted of his own death, because he is dead before there is any time to attain him, the finding of his death by the coroner is by necessity of law equivalent to an attainer in fact coming after his death. He cannot be *felo de se* till the death is fully consummate, and the death precedes the felony and the forfeiture."

The counsel on the other hand argued that the felony was inherent in the act which caused the death.

"The act consists of three parts: the first is the imagination, which is a reflection or meditation of a man's mind, whether or not it is convenient for him to destroy him-

self, and which way it can best be done; the second is the resolution, which is a determination of the mind to destroy himself; the third is the perfection, which is the execution of what the mind has resolved to do. And of all the parts, the *doing of the act* is the greatest in the judgment of our law, and it is in effect the whole. Then here the act done by Sir James Hales, which is evil, and the cause of his death, is the throwing himself into the water, and the death is but a sequel thereof."

Finally the court gave judgment for Cyriac Petit, the defendant. It held that although Sir James Hales could not have killed himself in his lifetime, yet "the forfeiture shall have relation to *the act done* by Sir James Hales in his lifetime which was the cause of his death, viz., the throwing himself into the water." "Sir James Hales was dead, and how came he to his death?—by drowning; and who drowned him?—Sir James Hales; and when did he drown him?—in his lifetime. So that Sir James Hales, being alive, caused Sir James Hales to die, and the act of the living man was the death of the dead man. He therefore committed felony, although there was no possibility of the forfeiture being found in his lifetime, for until his death there was no cause of forfeiture."

Richer comedy than this can hardly be imagined, even in a law court; and it will thus be seen that, in this instance, Shakespeare has merely adapted this trial to the case of Ophelia, and its learned discussion to the intelligence of his gravediggers. Such a statement may perhaps pluck a growing feather from Shakespeare's wing; but in other cases we shall have to trace his legal lore beyond the trials of his day, and even deeper than the records of Plowden.—*Pump Court*.

BANK OF TORONTO V. COBOURG, PETERBOROUGH AND MARMORA RAILWAY COMPANY.

REPORTS.

ONTARIO.

MASTER'S OFFICE.

BANK OF TORONTO V. COBOURG, PETERBOROUGH AND MARMORA RAILWAY CO.

Directors acquiring debentures at a discount—Fiduciary relation.

A railway company was authorized to issue debentures for such sums and at such interest as the directors might deem expedient.

Held, that under such a power the directors could issue and sell debentures at a discount.

Certain directors of a railway company who were creditors of the company obtained, at a discount of twenty-five per cent., debentures for the amount owing to them. In an action by other debenture holders a judgment was made directing an enquiry and an account of what was due to all the debenture holders of the company. The above-named directors with others came into the Master's Office to prove their claims, and thereupon the plaintiffs contended that the directors being trustees for the company could only be allowed the moneys actually advanced by them to the company.

Held, (1) That the relationship of the various debenture holders *inter se* was that of creditors; and that whatever might be the rights of the company against the directors, there was no fiduciary or trust relation between the plaintiffs and these directors which would entitle the plaintiffs to complain of the purchase of these debentures by the directors, or to invoke against them the equitable rule which prevents a trustee making a profit at the expense of his *cestui que trust*.

(2) That the plaintiffs as creditors of the *cestui que trust* (the company) could not enforce any claim such *cestui que trust* might have against the trustees.

(3) That the debenture holders were entitled to be paid *pari passu*; and that they were all placed on an equality as to payment, rate of interest, and remedy.

(4) That the proceeding under the judgment was to enforce the rights of all the debenture holders as creditors, and could not be made a proceeding to make the directors account as trustees.

[Mr. Hodgins, Q.C.—Jan. 8.

This was an action by the plaintiffs on behalf of themselves, and of all other debenture holders of the company, for a sale of the railway, and payment of the amounts of their debentures. The case is reported in 7 Ont. R. 1.

THE MASTER IN ORDINARY. — The judgment directs an enquiry as to who, other than the plaintiffs, are the holders of the bonds of the same class of the defendant company, and an account of what is due to such bondholders.

These bonds or debentures to the amount of \$300,000 were issued under 38 Vict. c. 47, O., and are declared to be a first charge upon the property

of the company. The debentures were intended to be issued at a discount, and several of them were so issued, but others were taken by some of the present holders at par.

Debentures to the extent of \$156,000 were issued by the Managing Director to John H. Shoenberger, G. J. Shoenberger and Mrs. Butts (to the latter for one Isaac Butts), at a discount of twenty-five per cent., for moneys obtained by the defendant company on the discount of notes made or endorsed by these parties for the benefit of the company.

At the time the proceeds of this discount were received by the company, the Shoenbergers and Butts were directors of the defendant company. In 1875 Butts died, and his place at the Board was taken by his son, and in that year these debentures issued as follows: fifty-two to John H. Shoenberger, fifty-two to G. J. Shoenberger, and fifty-two to Mrs. Butts, widow of Isaac Butts.

The plaintiffs contend that these parties, the Shoenbergers, as being directors, and Mrs. Butts, as claiming under the will of Isaac Butts, can only be allowed the amount actually advanced by them to the defendant company; that they could not as such directors sell these debentures to themselves, nor could they claim to hold them at a profit beyond what the company owed them on the notes discounted for its benefit.

The Act authorizes the directors to issue debentures for such sums and at such rate of interest not exceeding eight per cent. per annum, "as they may deem expedient." Under this power I think the directors may lawfully issue and sell debentures at a discount. The Act also makes these debentures a first charge on the property and franchises of the company without preference or priority of any one debenture so to be issued over any other debenture so to be issued. It further gives the debenture holders the right to foreclose; and it provides that "in case of a foreclosure each debenture holder shall be the owner of one share for each one hundred dollars of principal money due to him in respect of the debentures" of the class foreclosing; and that "the capital stock of the new company shall in case of a foreclosure be the amount of the principal money due in respect of the debentures of the said last mentioned class."

The judgment before me provides for a sale instead of a foreclosure; but that cannot alter the statutory rights expressly given to these debenture holders by the Act.

The plaintiffs, as debenture holders, are creditors of this company of the same class as the parties named. There is no fiduciary or trust relation between the plaintiffs and these directors which would entitle the plaintiffs to invoke the equitable

BANK OF TORONTO V. COBOURG, PETERBOROUGH AND MARMORA RAILWAY COMPANY.

jurisdiction of the Court. These directors obtained their title to these debentures before the plaintiffs became debenture holders. The plaintiffs, therefore, had no beneficial interest or claim in any of these debentures when these directors obtained theirs. All debenture holders stand on the same footing *inter se* as creditors of the company. Each debenture holder knows that he holds part of an issue of debentures for \$300,000 *pari passu* with other holders; that they are all alike as to payment, rate of interest and remedy; that there is no priority among them, and that they are in every way placed on an equality as to right and remedy as between themselves.

The parties whose property is chargeable with, or may be foreclosed or sold to pay these debentures—the company or its shareholders—are the proper parties to complain of the purchase of these debentures by these directors, but they do not complain. They, as the *cestuis que trustents* of these directors, are alone entitled to any profit—if profit there be—acquired by them as their trustees.

No case has been cited to show that any such claim of a *cestui que trust* vests in, or can of right be enforced by, the creditors of such *cestui que trust*, as these plaintiffs are; and it is well settled that a trustee's claim against a trust estate cannot be enforced by the creditors of such trustee: *Warroll v. Halford*, 8 Ves. 4. Any such claim would import a mischievous principle, giving strangers to a trust the right to sue for an administration of the trust estate: *Herriott's Hospital v. Ross*, 12 Cl. & Fin. 507; *Lewin on Trusts*, 108.

The point came up, and was decided adversely to the contention now made, in *Campbell's Case*, 4 Ch. D. 470, where it was held that a director taking debentures issued by his company at a discount the same as others could obtain them at was not liable to the company for such discount. *Bacon, V. C.*, said that the case did not fall within the principle upon which the application was based, viz.: "the principle which Courts of Equity have always adhered to, not to permit an agent or director, or any person in a fiduciary character, and having power and influence in the concern, to make a profit by his dealings with the concern."

A similar rule prevails in the jurisprudence of the United States.

The purchase by a trustee of property of his *cestui que trust* is voidable at the option of the latter. But he may affirm the sale or not impeach it; and if regular in other respects it cannot be questioned by third parties on the ground of its being a purchase by a trustee. It is the fiduciary relation to the beneficiaries of an estate which prevents a trustee from purchasing the estate.

But a violation of his duty in this respect may or may not be questioned at the option of the beneficiaries, but not by persons who have not that relationship to the trust estate: *Baldwin v. Allison*, 4 Minn. 25.

So where the administratrix of an estate foreclosed or sold under process of a Court certain lands which had been mortgaged to the intestate and purchased the lands for herself, it was held that although the sale might be set aside by the heirs, its validity could not be questioned by the creditors of the estate: *Kern v. Chalfant*, 7 Minn. 487.

Nor is the assignee of a beneficiary or *cestui que trust* entitled to an account against trustees for a breach of trust, or to avoid transactions between such *cestui que trust* and his trustee on the ground of a fiduciary relationship between them: *Hill v. Boyle*, L. R. 4 Eq. 260; *Rice v. Cleghorn*, 21 Ind. 80. In the latter case the judge said: "The purchase of trust property by a trustee is not void, but may be avoided by the *cestui que trust* within a reasonable time in a direct proceeding for that purpose, but such a result cannot be effected at the suit of a third person."

Nor can one who claims possession of the trust estate under the *cestui que trust* invoke the fiduciary or trust relation to impeach a wrongful purchase made by the trustee of such trust estate. *Jackson v. Van Dalfsen*, 5 Johns, N.Y., 43, was a case where one M. was employed by one Ten Eyck as his agent to sell certain lots. He sold the same on the 26th July to one V., who, on the 30th July, conveyed them to himself. It was proved that the conveyances were made to V., and by V. to M. for the purpose of transferring the title in the lots to M. Ejectment was then brought against the tenant holding under Ten Eyck; the defendant contended that the sale to M. was a breach of trust and was void, but the Court held that the defendant was a stranger to the transactions between the trustee and *cestui que trust*, and could not avail himself of the objection that M. had been guilty of a breach of trust in acquiring the title.

Besides, these directors are here as creditors enforcing their rights as such. Rightly or wrongly as between themselves and the company, they have possession of these debentures as creditors, and this proceeding is not a proceeding to make them account as trustees: *Re United English and Scottish Assurance Company*, L. R. 3 Ch. 787.

In no sense, therefore, can these directors be held to be trustees or agents for the plaintiffs or the other debenture holders of the company, or bound by any fiduciary or trust relation to account to them for their acquirement of these debentures.

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NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**SUPREME COURT OF CANADA.****WEST NORTHUMBERLAND ELECTION CASE.***Appeal—Wager by agent with voter—Bribery
—Corrupt practices.*

The charge upon which this appeal was decided was known as the Pringle-Parker case. Pringle, the President of the Conservative Association, made a bet of \$5 with one Parker, a Liberal, that he would vote against the Conservative party, and deposited with a stakeholder the \$5, which after the election was paid over to Parker.

At the trial Pringle denied that he was actuated by any intention to influence the conduct of the voter, and Parker said he had formed the resolution not to vote before he made his bet; but the evidence showed that he did not think lightly of the sum which he was to receive in the event of his not voting, his answer to one question put to him being: "Oh! I don't know that \$5 would be an insult to any person not to vote."

Held (reversing the judgment of the Court below), that the bet in question was colorable bribery within the enactments of sub-sec. 1 of sec. 92 of the Dominion Elections Act, 1874, and a corrupt practice which voided the election.

Appeal allowed with costs.

Kerr, Q.C., and MacLaren, for appellants.

D. McCarthy, Q.C., for respondent.

MERCHANTS' BANK V. GILLESPIE ET AL.

45 Vict. cap. 23—*Not applicable to companies incorporated under "The Companies Act, 1862,"—Imperial—Foreign insolvent trading companies.*

The Steel Company of Canada (Limited), incorporated in England under the Imperial Joint Stock Companies Acts, 1812-1867, and carrying on business in Nova Scotia, and having its principal place of business at London-

derry, N.S., was by order of a judge on the application of the respondents, and with the consent of the company, ordered to be wound up under 45 Vict. ch. 23. The appellants, creditors of the Steel Company, intervened and objected to the granting of the winding up order on the ground that 45 Vict. ch. 23, was not applicable to the company.

Held (reversing the judgment of the Supreme Court of Nova Scotia, FOURNIER, J., dissenting), that 45 Vict. ch. 23, is not applicable to said company,

Per STRONG, J.—This being a company having its domicile in England, and being subject to an express statutory provision for its winding up in the appropriate forum for such a purpose, *i.e.*, the forum of its domicile, a colonial statute providing for the winding up of the same company would be *ultra vires* and void, not merely upon the interpretation of the clauses as to the general powers of the Dominion Parliament in the British North America Act, but by the express provision of a paramount law, 28 and 29 Vict. ch. 63, Imp.

Appeal allowed with costs.

Henry, Q.C., for appellants.

Laflamme, Q.C., and Sedgwick, Q.C., for respondents.

O'SULLIVAN V. HARTY.

Practice—Time for appealing under Supreme Court Act, sec. 25—Security under sec. 31, as amended by sec. 14 of the Supreme Court Amendment Act, 1879.

Judgment was pronounced in the Court of Appeal of Ontario on the 30th June, 1884. Vacation begins in that Court on the 1st July and ends on the 30th August. On the 13th September the respondent (the appeal having been allowed) deposited \$500 as security for the costs of an appeal to the Supreme Court of Canada, and applied for leave to appeal. The Court of Appeal was of opinion that the security, not having been deposited within thirty days of the pronouncing of the judgment, was given too late, as the vacation did not interrupt the running of the time allowed by the statute (Sup. & Ex. Ct. Act, sec. 25,) for appealing.

The judgment of the Court of Appeal was not entered until November 14, 1884, the delay

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having been occasioned by a substantial question affecting the rights of the parties having arisen on the settlement of the minutes. Such question was discussed before one of the judges and subsequently before the full Court before being finally determined.

On November 27th, 1884, the respondent in the Court of Appeal applied to a judge of the Supreme Court of Canada, in Chambers, for leave to give security under sec. 31 of the Supreme Court Act, as amended by sec. 14 of the Supreme Court Amendment Act of 1879. This application was referred to the full Court, which

Held, that the time for bringing the appeal in this case under sec. 25 of the Supreme Court Act began to run from the 14th November, 1884, the date of *entry* of the judgment of the Court of Appeal.

That where any substantial matter remains to be determined before the judgment can be entered, the time for appealing runs from the *entry* of the judgment. Where nothing remains to be settled, as, for instance, in the case of the simple dismissal of a bill, or where no judgment requires to be entered, the time for appealing runs from the pronouncing of the judgment.

In appeals coming from the Province of Quebec, the time for appealing runs in every case from the pronouncing of the judgment, owing to the peculiar form of procedure in that Province.

Application allowed.

O'Sullivan, for appellant.

Whiting, for respondent.

CITY OF MONTREAL V. HALL.

Action for malicious prosecution—Damages—Arts. 2262, 2267, C. C. not applicable.

On the 7th of July, 1868, the council of the city of Montreal passed a resolution authorizing and directing proceedings to be instituted for the purpose of staying all proceedings of certain commissioners appointed under 27 and 28 Vict. ch 66 (by which proceedings they had determined the price or compensation to be allowed to one W. for expropriating certain property in the city of Montreal), and of having the said commissioners (plaintiff being one of said commissioners) removed as persons

who had forfeited their obligations as such commissioners. A petition was then presented to one of the judges of the Superior Court of the Province of Quebec by the corporation of the city of Montreal, wherein certain charges of venality and corruption were made against the plaintiff, and they prayed for the removal from the office of said commissioner the said plaintiff. By a judgment of the Superior Court, dated 17th September, 1870, the plaintiff was acquitted of the calumnious charges; but he was removed from the office for another cause which on appeal was pronounced by the Court of Appeal, and subsequently by the Privy Council to have been insufficient and unfounded.

Plaintiff in May, 1871, instituted an action against the corporation setting forth the above facts, and alleging that the proceedings in the Courts had been instituted maliciously and without probable cause, and alleging that the effect of so falsely and maliciously prosecuting such proceedings was to deprive the plaintiff almost wholly of the benefit of his profession by branding him as venal and corrupt, and unworthy of all trust and confidence, and claimed \$20,000 damages.

To this action the appellants pleaded *inter alia*, that the action was for libel and barred by Arts. 2262 and 2267 C. C., and that no action lies against them under the circumstances appearing in the case.

Held (affirming the judgment of the Court below, FOURNIER, J., dissenting), that the declaration disclosed an action for malicious prosecution in that legal proceedings of a civil nature had been instituted maliciously and without probable cause, and as the proceedings were only terminated upon the delivery of the judgment of the Superior Court on the 17th September, 1870, whereby the plaintiff was acquitted of the calumnious charges made, the prescription did not begin to run before the date of said judgment, and the action was not barred by Arts. 2262 and 2267 C. C.

That there was sufficient evidence of malice and want of probable cause to justify the damages awarded to respondent by the Court below.

Appeal dismissed with costs.

Roy, Q.C., for appellants.

Barnard, Q.C., for respondents.

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CHANCERY DIVISION.

Full Court.]

[March 21.]

CAMERON V. CARTER.

Purchase by instalments—Outstanding mortgage—Rights of purchaser.

Cain agreed to sell certain lands to Carter for \$1,400, payable in yearly instalments of \$100 each, with interest, and he covenanted that on payment of the said sum of money he would convey the said lands to Carter by a good and sufficient deed in fee simple.

There was at the time of this agreement a mortgage on the property still in force, but of which the principal money would be payable off long before the last instalment of the purchase money would be due under the agreement.

Some of the instalments being unpaid, Cameron & Campbell, to whom Cain had assigned the agreement, sued Carter for the amount. Carter defended on the ground that he was entitled either to have the mortgage paid off or to be secured against it, before he could be forced to pay the instalments of purchase money.

Held, that the plaintiffs were bound to ensure the defendant in making the intermediate payments that he, the defendant, would have a good title, clear of incumbrances, when the period of completion of the contract had arrived. They were not justified in seeking to enforce payment of all the instalments, leaving a merely personal remedy for the defendant in case the plaintiffs should not be in a position so to convey. When the price is payable by instalments the purchaser has a right to have a reference as to title, and to have title manifested before he makes a single payment.

Gamble v. Gummerston, 9 Gr. 199, approved of.

H. J. Scott, Q.C., for the defendant (appellant).

A. H. F. Lefroy, for the plaintiffs.

Ferguson, J.]

[March 29.]

LESLIE V. CALVIN ET AL.

Patent—Action against executors for infringement—Profits to estate—Actio personalis cum persone movetur.

The plaintiff sued the executors of D. D. C., claiming an account from them of all benefit accrued to the estate of D. D. C., by reason of certain alleged infringements by him of a certain patent of the plaintiff, being a patent for a Withe Crushing Machine, which patented machine D. D. C. was alleged to have caused to be made for his own use, and to have used. The defendants demurred to the claim so far as it sought for damages suffered prior to the death of D. D. C.

It appeared clearly from the statement of claim that the real meaning of it was that the benefit which accrued to D. D. C. from his alleged infringement was simply the saving of expense to him by the use of the machine in question, and the demurrer was argued in this view.

Held, that, this being so, *Philips v. Humfrey*, 24 Ch. D. 439, was a binding authority in favour of the demurrer, which must therefore be allowed.

Semble, that if the statement of claim could be read to mean that by reason of the wrongful act, property of a tangible character passed from the plaintiff's estate to that of the deceased—that the deceased, by the wrongful act, put into his estate some value or property other than and different from the saving of expense by the use of the machine, the conclusion might be quite different.

Marsh, for the plaintiff.

Clement, for the defendants.

Ferguson, J.]

[March —.]

GRANT ET AL. V. LA BANQUE NATIONALE.

Banks and banking—Pledge of timber limits to bank—Additional security—Quebec regulations as to timber on Crown Lands—34 Vict. c. 5, D., secs. 40, 41.

Held, that sec. 28 of the revised regulations respecting the sale and management of the timber on Crown Lands in the Province of Quebec, which provides that lien holders "in

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order to enable them to obtain advances necessary for their operations" shall have a right to pledge their limits as security without a bonus becoming payable, is not to be restricted in meaning to pledges for future advances.

In 1877 F. obtained, for the purposes of his lumbering business, certain advances from the N. Bank, giving as security certain promissory notes, and as collateral security a written pledge of certain timber limits, whereby he purported to pledge the same to the bank, using merely the words, "I hereby pledge my rights to Licenses Nos. 470 and 471 to the N. Bank." During the next three years the bank made advances to F. In 1882 while F. was still indebted in a large sum and the pledge in force, the N. Bank got the Crown Lands Department to issue licenses of the timber limits to them, as the regulations enabled it to do.

Held, that the pledge fell within the prohibition contained in 34 Vict. c. 5, D., s. 40. The bank did not contract to advance any specified sum. They did not become bound to make any advance at all. It was not the case of a present advance on the security of the pledge, which was to be additional security, that is additional to such securities as F. might give upon contemplated transactions between him and the bank in his lumbering business, as well as for advances that had theretofore been made. It could not be said that the advances were not made upon this security, although they were to be thereafter made in the course of a business between the bank and its customers, when no doubt other securities would be taken at the time of making the advances. Hence the transaction could not be said to be one in which the lien was taken by the bank as additional security for debts "contracted" to the bank in the course of its business, so as to bring it within 34 Vict. c. 5, D., s. 41.

Held, however, that under the regulations of the Province of Quebec as to timber on Crown Lands, the transfer of the licenses to the defendants in 1882 gave the latter a complete ownership of them, and they having in this action volunteered to say that they claimed only a lien upon them for the indebtedness of F., they were entitled to a right "at least as

great as a lien" against the lands for such indebtedness.

T. S. Plumb, for the plaintiffs.

Marsh, for the defendants.

Boyd, C.]

[April 22.]

DAVIS V. HEWITT.

Horse-racing—Illegal contract—Imp. 13 Geo. II. c. 19.

D. and H. agreed to match a colt owned by D. against a colt owned by S. Under the agreement the stakes were deposited with P.

Held, that the race was an illegal one under 13 Geo. II. c. 19, one of the participants not being the owner of the horse he bet upon; and P was bound to pay over the deposit made by D. on demand made by him before disposal of it.

Moss, Q.C., and Wilson, Q.C., for plaintiff.

A. J. Wilkes, for the defendants.

Proudfoot, J.]

[April 22.]

RE OAKVILLE AND CHISHOLM.

Registered plan—Amendment—Assignee of person registering—Prohibition.

Land was granted to Col. Chisholm in 1831, and in 1832 was mortgaged by him to F. et al., to whom, on 7th March, 1836, he released his equity of redemption. On 1st August, 1836, a survey plan was made apparently at the instance of Col. Chisholm, covering the land, a portion of which was shown as Water Street. The plan was registered by Col. Chisholm's executors on 12th January, 1850. In May, 1852, F. et al., conveyed to R. K. C. and T. S., and in 1857 T. S. released to R. K. C. The latter made an application to the county judge to amend the plan by closing up a portion of Water Street.

Held, that R. K. C., claiming under F. et al., whose title was paramount to the plan, was not an assign within the meaning of the Registry Act, R. S. O. cap. 111, sec. 84, and that the county judge had no jurisdiction on his application to amend the plan, and prohibition was granted.

J. K. Kerr, Q.C., for the motion.

Tizard, contra.

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Boyd, C.]

[April 22.]

TRAVIS V. TRAVIS.

Donatio mortis causa—Gift inter vivos.

The defendant's mother, not expecting to live, gave the key of a cabinet where a mortgage made by the defendant was kept, to her son J., telling him that she wanted him to give the mortgage to the defendant in case she had not the privilege of seeing him again. The defendant was then sent for and came to the house. He saw his mother alone, and deposed that she said "Robert, your mortgage is there in that drawer, when you go home you can take it with you." He went away without getting the mortgage, and she died intestate. He subsequently got possession of the mortgage.

Held, that the mandate to J. was revoked when the intestate subsequently saw the defendant, and as there was no delivery after that there was no gift of the mortgage to him.

At the time that the intestate gave the key to J. she told him to endorse a receipt on the mortgage for interest which he did; and she also gave the defendant a signed receipt for interest.

Held, a valid gift of the interest.

Muir and Crerar, for the plaintiff.

McClive, for the defendant.

Proudfoot, J.]

[April 22.]

IN RE LAKE SUPERIOR NATIVE COPPER CO.

RE PLUMMER.

Company—Creditor delaying at company's request—Winding up—Restraining action by creditor—Setting aside order made by Court—Co-ordinate jurisdiction.

A petition by a creditor to rescind a winding up order made by FERGUSON, J., under 45 Vict. cap. 23 and 47 Vict. cap. 39, on the ground that the company was incorporated in the United Kingdom, was refused (without an expression of opinion as to the power of the Parliament of Canada to provide for winding up foreign companies) on the ground that the application should have been made to a Court of appellate jurisdiction and not to a Court of co-ordinate jurisdiction.

P., a creditor of the company on a bill of exchange, accepted by the company for the balance of an account stated, was requested by the manager and secretary at various times not to take proceedings. A winding up order having been made, P., a few days afterwards, commenced an action in the State of Michigan against the company. An *ex parte* was granted restraining him from prosecuting his action. On a motion to continue this injunction,

Held, that P. having delayed at the request of the company was entitled to be preferred, and the motion was refused.

Seem, that in the absence of the request for delay P. would have been allowed to proceed with his action on an understanding to abide by any order the Court might make, there being creditors in Michigan who might have gained priority.

H. J. Scott, Q.C., for petitioner, the interim liquidator.

G. M. Rae, for the English liquidator.

G. F. Shepley, for Plummer.

Boyd, C.]

[April 22.]

SMITH V. SMITH.

Will—Construction of—"Heir or heirs" equivalent to "child or children."

A testator made the following demise:—"I will to my son J. S., for the term of his natural life, the farm, etc.; but if my said son J. S. should have a lawful heir or heirs, then said lands shall be equally divided among them at the death of their father. But if my said son J. S. shall die without having lawful heirs, then in that case I direct that said lands to be sold, and the proceeds divided equally among my remaining children or their heirs."

Held, that the words "heir or heirs" in the first clause, and "heirs" in the second clause, meant "child or children," and "children," respectively.

J. S. had a living son child at the time of the action, and it being sufficient for the purpose of the action to declare that J. S. was once the tenant in fee simple, nor tenant in fee tail in possession, while the child lived it was so declared.

Carscallen, for the plaintiffs.

Bruce, for the infant.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Ferguson, J.]

[April 30.]

RE COULTER ET AL. AND SMITH.

*Vendors and Purchasers Act, R. S. O. c. 109—
Absent husband—Wife's conveyance.*

J. H. by his will, dated April 14, 1874, devised certain property to his daughter, M. A. J., for life with remainder to her children, and died soon after making the will. M. A. J. died about 1870 leaving five children, the youngest of whom came of age in 1884. Before the death of J. H., one of the children, M. J. J. married one C. and C. in 1870 deserted his wife and had not been heard of afterwards.

Held, that M. J. J. could convey all her interest in the property without the concurrence of her husband.

C. L. *Ferguson*, for the vendors.

W. *Middleton Hall*, for the purchaser.

Ferguson, J.]

[May 1.]

RE COOKE AND DRIFFEL.

Will—Devise—Estate—R. S. O. c. 109—Title.

R. C. by his will devised all his personal estate to his wife, M. S. C., to be held for the interest of his son, A. S. C., when he shall have arrived at the age of twenty-four years; and an annuity to his wife, M. S. C., for life; appointed her guardian to the son to take charge of all remaining money that should accrue from all sources; such money to be used for the necessary expenses of education, etc., for the son. He desired that the wife should have control of all money coming to the son till he was of the age of twenty-four years, and at that time all rents and other property should come into his possession except the annuity; that at the death of the wife all rents and all interests and all property should pass into the possession of the son to be owned by him, his heirs and assigns forever. In the case of the death of the wife before the son attained twenty-four another guardian with similar powers was appointed. In case of the death of the son before his mother then all the property and rents, etc., were to be hers during her natural life, and after her death one half to go to the testator's relations and the balance to the relations of

the wife, she making this disposition before her death; but if the son at the time of his death should leave a wife or children then all property should be subject to such disposition as he should make at the time of his death. In an application under the *Vendors and Purchasers Act, R. S. O. 109*, for the opinion of the Court, it was

Held, following *Gairdner v. Gairdner*, 1 Q. R. 184, that when a legatee or devisee is to have the absolute control of property at a specified time a subsequent gift-over will be limited to take effect before the time, and the son here having attained the age of twenty-four years and come into possession and control, the subsequent gift-over cannot affect his estate, or interest which has become absolute.

If the lands passed by the will the son and the widow joining as grantors can convey such title as the testator had at the time of his death.

If the lands did not pass by the will the son as heir at law and the widow as to dower can convey title as above.

Thos. J. Robertson, for the vendors.

Masten, for the purchaser.

BANK OF HAMILTON V. NOYE MANUFACTURING COMPANY.

Warehouse receipts—Validity of—Negotiation of note—Commingling of property—Tracing property covered by receipts—Affidavit evidence.

T., a miller, gave warehouse receipts for wheat to the plaintiffs attached to notes payable to their order to take up notes maturing which were secured by like receipts. The receipts were in the following form:—"Received in store in my warehouse or mill from farmers 2,000 bushels of wheat to be delivered to the order of myself to be endorsed hereon. This is to be regarded as a receipt under the provisions of statute 43 Vict. cap 22. The said wheat is separate from and will be kept separate and distinguished from other grain." The receipts were endorsed in blank.

Held, that the notes and receipts attached might be read together; that the endorsement of the receipts in blank was under the circumstances unobjectionable, and that they were valid in the hands of the bank.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Held, also that the mode of acquiring them, viz., by delivering up the maturing notes with receipts was unobjectionable, the transaction being in fact a negotiation of the notes; or at any rate there was a mere substitution or continuation of securities.

T. did not keep the wheat covered by the receipts distinct, but ground some of it and allowed the remainder to be mixed with wheat subsequently brought in. Before assigning in trust for creditors he pointed out one carload of flour made from the wheat covered by the receipts, and pointed out wheat in his mill which he admitted was covered by the receipts, and the next day the bank took possession. He subsequently assigned and the defendants afterwards recovered a judgment against him on an interpleader issue.

Held, that the plaintiffs were entitled to the wheat taken possession of by them.

Leave given to supplement the evidence given on the trial by affidavit evidence of documents under Rules 271 and 182.

Guthrie, Q.C., for the plaintiffs.

Moss, Q.C., and *Cutten*, for the defendants.

ADJALA V. McELROY.

Principal and surety—Municipal Treasurer—Annual re-appointment—Misconduct—Condoning misconduct—Release of sureties.

A treasurer was appointed by the plaintiffs under R. S. O. cap. 174, by sec. 274 of which all officers appointed by a council shall hold office until removed by the council. He furnished a bond dated 1st November, 1880. He was re-appointed annually for several years.

Held, the re-appointments were not equivalent to removals and re-appointments, but were rather a retention in office of the same treasurer, and that the sureties were not in consequence thereof discharged.

The treasurer having failed to account for large sums, the council of the plaintiffs caused a letter to be written to him on 27th February, 1882, requiring him to settle all claims by a certain day, otherwise a special meeting would be called to consider his case. He failed to settle and the council did not carry out their threat. In 1883 the council, again becoming dissatisfied with the treasurer, passed a resolu-

tion that no further payment should be made to him, but that all moneys should be paid into a certain bank. In 1884 the council for that year rescinded this resolution and permitted the treasurer to receive the accumulated funds. No notice was given to the sureties.

Held, that the plaintiffs had failed to perform their duties by retaining the treasurer in office after they became aware of his defalcations, and that the sureties were released from all liability after 27th February, 1882. A reference was granted at the plaintiff's election to take an account of the amount due under the bond to that date.

Lount, Q.C., and *Strathy*, for the plaintiffs.

Lennox and *Hearn*, for Patrick McElroy.

J. A. McCarthy, for the Can. P. L. & S. Co.

Pepler, for the other defendants.

CORE V. ONTARIO LOAN CO.

Registered title—Equitable charge—Priority.

W. and his son, W. W., in consideration of \$4,000, made a mortgage of separate parcels of land owned in severalty to the defendant company, containing a proviso for releasing W. W.'s land on payment of \$500. The covenant for payment was joint. W. W. sold his land to J. W. W. then mortgaged his land to the plaintiff by an instrument which declared it subject to the company's mortgage. The various conveyances were registered. It was proved that W. W. was merely a surety for his father in the mortgage transaction with the company, but there was no notice of this to the plaintiff by registration or otherwise.

Held (reversing the judgment of *PROUDFOOT*, J.), that the plaintiff's registered title prevailed over the equity of W. W. to charge his father's lands with the \$500 for which he had made his land liable; and that the plaintiff was therefore entitled to recover his mortgage out of the father's land before W. W. could charge it with the \$500.

Gray v. Ball, 23 Gr. 390, approved and followed.

MacLennan, Q.C., for the plaintiff.

Moss, Q.C., for the defendants, the Wilsons.

Hoyles, for the company.

Prac.]

NOTES OF CANADIAN CASES—CORRESPONDENCE—ARTICLES OF INTEREST.

PRACTICE.

Mr. Dalton, Q.C.]

[April 30.]

DEMOREST V. MIDLAND RY. CO. ET AL.

Tender of money—Striking out defence—Judgment under Rule 322, O. J. A.

An action to recover money as compensation for land expropriated by defendants, and for other relief.

The defendants in their defence denied the cause of action, and also alleged *inter alia* that they had tendered the plaintiff the sum of \$400 and interest, but that the plaintiff had refused to accept it, and they expressed their readiness to pay the said sum, but they did not bring it or any sum into Court with their defence.

The plaintiff in his reply admitted the tender, but alleged that the sum tendered was wholly inadequate.

Upon a motion by the plaintiff to strike out "such portion of the defence as alleges a tender," or for judgment for the plaintiff for the amount which the defendants expressed their readiness to pay.

Held, that since the Ont. Jud. Act, a defence of tender without a payment into Court is good.

Upon the pleadings an order might be made under Rule 322 O. J. A., for judgment for the plaintiff for \$400 and interest, but only as a final decision of the action, and not with leave to proceed for a further amount.

Holman, for the plaintiff.

Hoyles, for the defendants.

CORRESPONDENCE.

OSGOODE HALL AND ITS MEMORIES.

SIR,—As a matter of historical interest it is to be hoped that the Law Society will be able to carry out the suggestion of His Honour the Lieutenant-Governor, and speedily complete the series of portraits of the Chief Justices of Upper Canada.

I think it is also worthy of consideration whether it would not be a wise application of some portion of the society's funds, if steps were also taken to form a collection of busts and statues of some of

the great English lawyers. A beginning might readily be made by obtaining copies of those to be found in the Normal School gallery; and I have little doubt the English Inns of Court would readily grant facilities for taking copies of any in their possession. Such a collection, if judiciously made, would add materially to the interest of a visit to Osgoode Hall.

The large blank spaces in the walls of the Courts of Q. B., C. P., and Chancery Divisions might also at some future time be appropriately utilized for several paintings of memorable scenes in the history of the law, *e.g.*, the signing of Magna Charta, the Committal of Prince Henry by Gascoigne, the Trial of the Seven Bishops, etc., etc. Let us hope we may soon have Canadian artists equal to the task, and a society able and willing to patronize them.

H.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Casual connection in joint crimes.—*Central L. J.*, Jan. 2.

Summary remedies in cases of railway discrimination.—*Ib.*, Jan. 9.

Necessity for proof of manual delivery of deeds when dispensed with.—*Ib.*, Jan. 16.

Precatory trusts.—*Ib.*, Jan. 23.

Who are fellow-servants in relation to the liability of master for acts of?—*Ib.*, Jan. 9, 30.

Rights of street car platform passengers.—*Ib.*, Feb. 6.

Liability of municipal corporations for objects in streets which frighten horses.—*Ib.*

Powers of bank cashiers.—*Ib.*, Feb. 13.

Verdicts—Their nature, characteristics and amendments of.—*Ib.*, Feb. 20.

Want of knowledge as a defence in actions for negligence.—*Ib.*, Feb. 27.

Discharge of sureties by extension to principals.—*Ib.*, March 6.

A wife's liability as surety for her husband.—*Ib.*, March 13.

Right to recover taxes paid under mistake.—*Ib.*, March 20.

What constitutes a sufficient tender?—*Ib.*, March 27.

Rules as to the privileges of witnesses.—*Albany L. J.*, March 7, 28.

Common words and phrases (Household effects—Supplying heat—Body of water—Express business—Book—Approach to a bridge—Water course).—*Ib.*, March 14.

RESOLUTIONS OF CONDOLENCE—FLOTSAM AND JETSAM.

Jurisdiction of courts of equity over wills.—*Ib.*,
March 21.

The responsibility of the Pullman Palace Car
Company for thefts from passengers.—*Ameri-*
can Law Review, Vol. 19, p. 204.

The disposition of the body after death.—*Ib.*

A synopsis of the more important Imperial Acts,
etc., relating to Manitoba and the North-
West Territories (Continued).—*Manitoba L.*
J. March.

Constitutional regulations of legislative proceed-
ings.—*American Law Register*, March.

Loss of passengers' luggage by railway company—
What articles may be carried as baggage—
Liability as warehousemen (This article takes
as its text the judgment of Mr. Justice Taylor,
of Queen's Bench, Manitoba, in *McCaffrey v.*
C. P. R.).—*Ib.*

Allowing ferocious animal to be kept on premises.
—*Ib.*

Liability of solicitor on certificate of title—No
liability to assignee of a mortgage for error in
certificate given to mortgagee.—*Ib.*

RESOLUTIONS OF CONDOLENCE.

At a meeting of the Bar of Kingston, held on
4th May at the office of Dr. Henderson, Q.C.,
President of the Frontenac Law Association, the
following resolutions of condolence were unani-
mously adopted:

Moved by Mr. Britton, Q.C., seconded by Mr.
McMahon, That we, the members of the Kingston
Bar, desire to express our deep and heartfelt
regret at the lamented death of the late James
Stafford Kirkpatrick, Esquire, cut off in the prime
of life, who, by his invariably obliging and courteous
conduct in his intercourse with us, had earned our
fullest respect and esteem, and who has left behind
him no more honourable or upright member of his
profession.

Moved by Mr. Agnew, seconded by Mr. Whit-
ing. That we desire to convey to his widow, and
to the members of his family, our sincere sympathy
in their loss, which is also ours.

Moved by Mr. Walkem, Q.C., seconded by Mr.
Mudie. That as a mark of respect to our deceased
friend we attend his funeral and wear mourning
for one month.

Moved by Mr. Macdonnell, Q.C., seconded by
Mr. McIntyre, Q.C., That the Secretary send a
copy of these resolutions, signed by the President,
to Mr. Kirkpatrick's widow, and to the Hon. Geo.
A. Kirkpatrick, his brother.

FLOTSAM AND JETSAM.

SOME little while after the war, a citizen of
Georgia was indicted for hog-stealing. The follow-
ing was the verdict of the jury: "Owing to the
demoralization of the times, and the scarcity of
provisions, we, the jury, find the defendant not
guilty."—*Ex.*

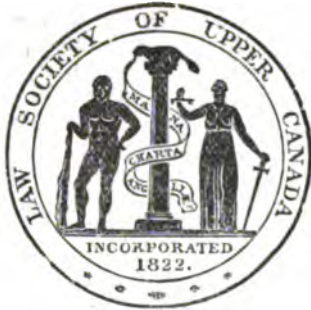
"How did you come to get in jail?" asked a
gentleman of a negro he saw behind the bars.
"Dey put me in heah for borrin' money from a
friend." "Why, they can't do that. It's no crime
to borrow money." "Yes, boss, but yer see I had
to knock him down wid a club several times before
he would loan it ter me, an' den I had to take it
outen his pocket myself."—*Ex.*

MR. JUSTICE KAY refuses to believe, in the ab-
sence of any detailed record, that a solicitor can
have forty-three different interviews referring to
one case in a single day. This judicial incredulity,
and the consequent upholding of the Taxing
Master's decisions, has reduced Mr. Cosedge's
bill of costs against Miss Sone of £1,319 1s. 3d.
by no less an amount than £702 19s. 2d. The
salary of a competent book-keeper in Mr. Cosedge's
office would therefore, probably be a judicious
expenditure.

THE New York Law Institute have entered on
the records of their society an elaborate minute in
commemoration of Mr. Charles O'Connor, who had
been a member of the institute for nearly sixty
years, and its president from 1869 to 1878, and who
bequeathed to it twenty thousand dollars and vari-
ous valuable articles besides, including "the long
array of his printed briefs." The very high re-
spect in which Mr. O'Connor was held, both person-
ally and professionally, is warmly testified in the
minute; and it appears to be the intention of the
institute to commemorate his connection with the
society in some more tangible and public form.
Mr. O'Connor is admitted to have been unexcelled
at Nisi Prius, and "in the Court in Banc he origi-
nated the practice of prefixing to the points of
argument a separate statement of the facts." In
the more public references to his death "just em-
phasis has been placed on the moral elevation of
his character, his lofty disdain of artifice and ex-
pediency, his stern devotion to the truth as it was
held by him according to his own deliberate con-
victions."

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

During Michaelmas Term the following gentlemen were called to the Bar, namely:—John Alexander MacKintosh, Adam Carruthers, Arthur Burwash, Henry Herbert Collier, James D. S. C. Robertson, John Douglas, James Alexander Hutcheson, Joseph Alphonse Valin, James Cæsar Grace, David Thorburn Symons, Dyce Willcocks Saunders, William Torrance Allan, Edmund Weld, Thomas Bulmer Bunting, William Travis Sorley, Isaac Norton Marshall, Frank Russell Waddell, Thomas James Decatur, Alexander George Frederick Lawrence, George Weir, William James Nelson, William David Jones, William Acheson Proudfoot, David F. McArdle; and the following gentlemen were admitted to the Society as Students-at-Law, namely:—Graduates: Frank Ambridge Drake, George Watson Holmes, Arthur Stevenson, Herbert Langell Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Holton Britton. Matriculants: Alexander Clarke, Henry Augustus Wardell, Herbert Ferdinand Bonzé, Duncan Henry Chisholm, Fergus James Travers, John Thomas Hewitt, Richard Vercoe Clement, James Alexander Haight Campbell, Robert Lazier Elliott, Robert Gordon Smyth. Juniors: George Carnegie Gunn, Herbert William Lawlor, James Arthurs, William Pinkerton, George Davey Heyd, Forbes Begue Geddes, Robert Elliott Lazier, Frederick Forsyth Pardee, William Locklin Billings Lister, Reginald Murray Macdonald, Ernest Edward Arthur Duvernet, Frank Stewart Mearns, Arthur Trollope Wilgress, Stephen Dunbar Lazier, Robert Segsworth, James Henry McGhie.

During Hilary Term, 1885, the following gentlemen were called to the Bar, namely:—Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry

Hubbs, Henry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurphy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Forbes Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, E. A. Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manly German, George McLaurin, and the following gentlemen were admitted as Students and Articled Clerks, namely: Graduates, John Henry Cosgrove, Alexander Henderson, Jr., John Arthur Tanner, Francis Alexander Anglin. Matriculants: Alfred E. Cole, Dioscore J. Hurteau, William Charles Mikel. Juniors: William Henry Moore, George Washington Littlejohn, Arthur St. George Ellis, George Smith McCarter, William Albert Smith, Ernest Napier Ridout Burns, Edmund Sheppard Brown, John Patrick O'Gara and William Walton passed the Articled Clerk's examination.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- | | | |
|----------------------|---|--|
| 1884
and
1885. | { | Arithmetic. |
| | | Euclid, Bb. I., II., and III. |
| | | English Grammar and Composition. |
| | | English History—Queen Anne to George III. |
| | | Modern Geography—North America and Europe. |
| | | Elements of Book-Keeping. |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- | | | |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major. |
| | | Virgil, Æneid, B. V., vv. 1-361. |
| | | Ovid, Fasti, B. I., vv. 1-300. |
| | | Xenophon, Anabasis, B. II. |
| | | Homer, Iliad, B. IV. |
| 1885. | { | Xenophon, Anabasis, B. V. |
| | | Homer, Iliad, B. IV. |
| | | Cicero, Cato Major. |
| | | Virgil, Æneid, B. I., vv. 1-304. |
| | | Ovid, Fasti, B. I., vv. 1-300. |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

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HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received

his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.	{ Cicero, Cato Major.
	{ Virgil, Æneid, B. I., vv. 1-304.
	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. V.
1887.	{ Homer, Iliad, B. VI.
	{ Xenophon, Anabasis, B. I.
	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. I.
1888.	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. I.
	{ Homer, Iliad, B. IV.
	{ Cæsar, B. G. I. (vv. 1-33.)
1889.	{ Cicero, In Catilinam, I.
	{ Virgil, Æneid, B. I.
	{ Xenophon, Anabasis, B. II.
	{ Homer, Iliad, B. IV.
1890.	{ Cicero, In Catilinam, II.
	{ Virgil, Æneid, B. V.
	{ Cæsar, Bellum Britannicum.
	{ Xenophon, Anabasis, B. VI.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886)

1888) Souvestre, Un Philosophe sous le toits.

1890)

1887) Lamartine, Christophe Colomb.

1889)

OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

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No. 11.

DIARY FOR JUNE.

1. Mon..... Fenian attack, 1866.
2. Tues..... Maritime Court Sittings.
6. Sat..... Easter Sittings of Common Law Division, H. C.
J. end.
7. Sun..... 1st Sunday after Trinity.
8. Mon..... County Court and Surrogate Court Term (York).
Parliament first met at Ottawa, 1866.
9. Tues..... General Sessions and County Court (ex. York).
13. Sat..... County Court and Surrogate Terms (York) end.
14. Sun..... 2nd Sunday after Trinity.

TORONTO, JUNE 1, 1885.

THE *Central Law Journal* which ought to know and is not in the habit of using strong language, speaks of American life insurance companies in the following fashion: "Life Insurance is the great American fraud; and the only difference between the two systems—the regular and the co-operative—is the difference between two frauds. In both of them a fool trusts his cash to a man of whom he knows nothing, without security."

THE *English Law Times* in referring to the Torrens System of land transfer lately, although doubting the feasibility of its successful application to England, nevertheless gives the following commendation of the system:—"The fundamental principle of the Torrens System is the grant of certificates of title by a land registry office. Once granted, the certificate is for all purposes the conclusive document of title to the land. In a country where titles are more or less uniform in origin, and all date from within a period of fifty

years or so, nothing could be neater or more effective."

What the *Times* considers the best field for its introduction is the very kind of one which the Province of Ontario presents. Mr. Mowat has made a beginning by the Act of last session—but this Act applies only to the County of York. It is, however, safe to say that if the system is found to work satisfactorily in one of the oldest settled counties, and one that includes properties held by such difficult titles as are to be found in the city of Toronto, it will work anywhere else within the Province, and its general extension may be looked for if its success in York is demonstrated by a fair trial.

The Act as finally passed has not yet been published. It would, therefore, be premature at present to attempt to discuss its details. We hope to return to the subject when the statutes have been issued.

TREASON-FELONY IN THE NORTH-WEST.

THIS Dominion has just passed through an ordeal that has so far reflected the highest credit upon all those who have had in charge the maintenance of law and order. The administrative action has been excellent, and our citizen soldiers have fought and suffered with a courage and patient endurance which adds new lustre to the military renown of the Canadian militia.

TREASON-FELONY IN THE NORTH-WEST.

We have now arrived at the legal stage of this matter—the trial and punishment of the chief offenders—men who have wilfully and without cause put the country to enormous expense, destroyed the property of its citizens, shed innocent blood, and created intense distress and suffering without stint or pity.

The principal Act to be looked at as regards the trial of Riel is 31 Vict. c. 14. Section 2 of this Act empowers the Governor-General to order a Militia General Court Martial to try a case like Riel's, supposing him to be, as it is said he is, a citizen of the United States; and section 3 applies this provision to a Canadian citizen or subject. Section 4 makes the offence a felony, punishable under ss. 2 and 3 by death, and it would be triable under the North-West Territory Act, 43 Vict. c. 25, ss. 75, 76, 77. In section 4 the word "Province" is used, and the offender may be tried in any county or district of the Province in which the offence is committed. Although the North-West Territories are not made a province expressly, yet the said Act and the Militia Act, 46 Vict. c. 11, are expressly extended to them (the North-West Territories) by 43 Vict. c. 25, so that Riel might probably be tried in any part of the North-West Territory by Court Martial; or if the Governor does not choose that he should be so tried, then he may be prosecuted and tried in any part of the North-West Territory for the felony, and if found guilty might be punished with death. In this case the trial would be by stipendiary magistrate and justice of the peace and a jury of six under the 43 Vict. c. 25, ss. 75, 76, with an appeal under sec. 77 to the Queen's Bench in Manitoba, which court could confirm the sentence or order a new trial, but could not alter the sentence. The mode of proceeding as to such appeal is to be governed by "ordinance of the

Lieutenant-Governor (of the North-West Territory) in Council." Whether such ordinance has been made we are not aware.

It might be thought too late to make any such provision now in Riel's case (if it has not been done), though there would seem to be no real objection, if nothing but matters of form were affected, and not the evidence or punishment or liability of the accused.

This supposes the trial can only be by a stipendiary and justice of the peace, subject to the appeal to the Queen's Bench, but *query*, cannot the Governor-General, representing the Queen, appoint justices of gaol delivery at any place in the North-West Territory, and so send up one or more judges, making them for the nonce stipendiary magistrates; justices of the peace they would be, though perhaps not for the Territories, but they could be made so. The Revised Statute of Ontario, chap. 41, treats the appointment of judges of gaol delivery as a prerogative of the Crown and so does the Revised Statute of Manitoba, chap. 38, and it does not seem that any special statutory provision is required where English law prevails, as it does throughout Canada in criminal cases. If they acted as judges of gaol delivery their judgment might not be subject to appeal under 43 Vict. c. 25, but to the same incidents as in any province under our General Criminal Acts, 32, 33 Vict. c. 29, ss. 50, and 38 Vict. c. 11, s. 49 (Supreme Court); but then, how about the jury? There does not appear to be any provision in 43 Vict. c. 25 or the Amending Act, 47 Vict. c. 23 for the summoning of a jury of more than six, and this might possibly raise a difficulty in the way of treating such a court as an ordinary criminal court, and so not subject to appeal to the Queen's Bench in Manitoba.

The court martial, if that tribunal were

TREASON-FELONY IN THE NORTH-WEST—RECENT ENGLISH DECISIONS.

selected, would be a general one, and by the Militia Act, 46 Vict. c. 11, ss. 72, 73, 74, such courts are governed by the regulations made in like case for the regular army when not inconsistent with the Provincial Act. These regulations we have not before us, but by section 74 the sentence must be approved by the Queen; and by section 72 no officer of the regular army on full pay can sit on such court.

To sum up, Riel may be tried by court martial if the Governor pleases, the sentence only being subject to the Queen's approval, and we presume she can soften it if she pleases; or, he can be tried under the 31 Vict. c. 14 by a stipendiary magistrate with a jury of six, under 43 Vict. c. 25, subject to an appeal to Queen's Bench of Manitoba which may confirm the judgment or order a new trial, but cannot modify the judgment; if so confirmed the judgment would, we presume be subject to appeal to the Supreme Court under 38 Vict. c. 11, s. 49, unless the judgment of confirmation is unanimous; or the Governor may appoint a judge or judges to try the case, taking the precaution to make him or them also a stipendiary magistrate or stipendiary magistrates for the North-West Territory, and the foregoing remarks apply *mutatis mutandis* to cases of the other rebels.

It is desirable that justice should be meted out to Riel and the other leaders of the rebellion with as little delay as possible. Of course the cold-blooded murderer of Scott cannot now be tried for that crime, though the blood of his victim still cries for vengeance. There is, however, blood enough and to spare on his hands without that. In his case one cannot be said to prejudge in assuming that he will be found guilty of the highest crime known to the law, taken as he has been red-handed. At the same time let him have a fair trial; let it be conducted with due form and ceremony, with every oppor-

tunity of defence and without unseemly haste. If he is found guilty let justice swift and sure be done in the premises. Mr. Christopher Robinson, Q.C., and Mr. B. B. Osler, Q.C., have been retained by the Crown to conduct the prosecution.

 RECENT ENGLISH DECISIONS.

The May number of the *Law Reports* include 14 Q. B. D. pp. 561-837; 10 P. D. pp. 61-99; 28 Chy. D. pp. 469-726.

JUDGMENT DEBTOR—ORDER TO PAY DEBT BY INSTALLMENTS—COMMITTAL.

Passing by two or three cases of merely local interest we come to *Ex parte Koster* (14 Q. B. D. 597), a decision of the Court of Appeal which may perhaps be useful to note as bearing on a branch of Division Court practice in this Province, the question being whether a judgment debtor who had been ordered to pay a debt by monthly instalments, had "the means to pay." It appeared that the debtor had had an allowance of £5 per week made him by his brother as a voluntary gift, and the Court was of opinion that in estimating the debtor's means of paying, money derived from a gift may be properly taken into account.

MEMBER OF PARLIAMENT—OATH OF ALLEGIANCE—SITTING AND VOTING WITHOUT TAKING OATH.

The next case we think it useful to note here is that of *The Attorney-General v. Bradlaugh* (14 Q. B. D. 667), which occupies over fifty pages of the Reports. The action was in the nature of an information to recover penalties against the defendant for sitting and voting as a member of the House of Commons without taking the oath of allegiance prescribed by statute. It will be remembered that the defendant is unhappily a pronounced disbeliever in the existence of a Supreme Being, but had nevertheless, contrary to the will of the House of Commons and

RECENT ENGLISH DECISIONS.

against the orders of the Speaker, gone through the form of taking and subscribing the oath prescribed by statute. But the Court of Appeal very properly affirmed the decision of the Queen's Bench Division that an oath taken by such a person and under such circumstances is not a compliance with the statute, and is in fact no oath at all. The rule laid down in the celebrated case of *Omichund v. Barker*, 1 Atk. 21, as to the necessary religious belief required in a person taking an oath, was approved and held applicable to a person required to take an oath under a statute, as well as to a witness required to give evidence in an action.

Brett, M.R., quotes with approval the words of Willes, C.J., in that case: "I am of opinion that such infidels as believe in a God, and that He will punish them if they swear falsely, may, and ought to be, admitted as witnesses in this, though a Christian country. And, on the other hand, I am clearly of opinion that such infidels (if any such there be) who either do not believe in a God, or if they do, do not think that He will either reward or punish them in this world, or the next, cannot be witnesses in any case, nor under any circumstances," and Cotton, L.J., at p. 707, says: "What is meant by 'make oath'? It must mean that which by the law of England is an oath. Parliament undoubtedly is speaking with reference to the well established law of England, and the law of England undoubtedly is this: That if a person is in the unhappy position of not believing in a Supreme Being, or not believing that there is a Supreme Being who will punish for the offence of telling an untruth—it is immaterial whether it is in this or a future world—then the person who is in that state does not, though he goes through the form of taking the oath, take that which the law of England recognizes as an oath."

OFFICER OF BOARD—CONCERNED OR INTERESTED IN ANY CONTRACT OR BARGAIN.

The next two cases, *Burgess v. Clark* (14 Q. B. D. 735), and *Todd v. Robinson*, *Id.* p. 739, although involving the construction of statutes of merely local operation, may nevertheless be here briefly noted. In the former case it was held that a demise of rooms was a "bargain or contract;" and in the latter, that an officer who was a shareholder of a company which had a contract with the board of which he was an officer was interested in a bargain and contract, and that in both cases the defendants were consequently liable to the penalties imposed by statutes for having or being interested in bargains or contracts with the board of which they might be officers.

EXPROPRIATION OF LANDS—HOUSE INJURIOUSLY AFFECTED—SPECIAL VALUE AS A PUBLIC HOUSE—COMPENSATION.

We now come to the case of *Re Wadham and The North Eastern Railway Co.* (14 Q. B. D. 747), which was a case stated by an arbitrator for the opinion of the Court, in which the Court was asked to say whether or not, where roads are altered and stopped up by a railway company, they are bound to make compensation to the owners of the adjoining property, for the depreciation in the special value of the premises as an hotel and public house. The Divisional Court, consisting of Matthew and Day, JJ., held that the owners of the premises were entitled to compensation for the depreciation thus occasioned to the special value of the premises.

Matthew, J., who delivered the judgment of the Court, thus stated what he considered to be the result of the previous authorities. "I do not understand the learned judges to have intended to lay down more than this, viz: that you are not, in calculating the damage for injuriously affecting the premises, to take into account any special and exceptional value which the premises

RECENT ENGLISH DECISIONS.

may have in the possession of the then proprietor, but you are to see whether or not the value of the property as a marketable article to be employed for any purpose to which it may legitimately and reasonably be put, has been interfered with or not."

In the following case of the *Queen v. Essex*, (14 Q. B. D. 753), a similar question is discussed. In this case part of a building estate was expropriated for a sewage farm, whereby the value of other parts of the land near to the part so taken was depreciated, even in the absence of any nuisance from the sewage farm when made, and it was held by the same learned judges, that the owner of the property was entitled to compensation, not only for the land actually taken, but also for damage occasioned by the other lands retained by him being injuriously affected by the expropriation. In giving judgment Day, J., makes some adverse comments on the case of *Vaughan v. Taff Vale Railway Co.* (5 H. & N. 679), which he considers was decided on a mistaken view of the statutes, and which establishes that where no land of an individual is taken, the latter cannot recover damages merely by reason of his land being injuriously affected by public works constructed in the neighbourhood—but he thought it was equally well established, that when any portion of a man's land is taken, he shall have full compensation for the injury that is done to him.

HUSBAND AND WIFE — SEPARATION DEED — COVENANT AGAINST MOLESTATION.

In *Fearon v. The Earl of Aylesford* (14 Q. B. D. 792), the Court of Appeal affirmed the judgment of the Divisional Court reported 12 Q. B. D. 539—and held that if in a separation deed a husband covenants to pay his wife an annuity, without restricting his liability to such times as she shall be chaste, the covenant remains in force, though the wife afterwards commit adultery—and further, that the commission of adultery by a wife, followed by the

birth of a spurious child, is no breach of a covenant against molestation contained in a separation deed. The Court moreover held that covenants in a separation deed by which the husband covenants to pay to a trustee for the wife an annuity, and the trustee covenants with the husband that the wife shall not molest him, must be construed as independent covenants, in the absence of any express terms making them dependent, and therefore, a breach of the covenant against molestation is not an answer to an action to recover the annuity.

INDEMNITY—GOODS LAWFULLY SEIZED FOR ANOTHER'S DEBT.

The next case which we come to is an important one on the subject of indemnity, viz: *Edmunds v. Wallingford* (14 Q. B. D. 811). The plaintiff was the trustee in bankruptcy of certain parties whose goods, prior to the bankruptcy, had been taken in execution and sold to satisfy a debt due by the defendant. After the sale the defendant, in consideration of the goods of the bankrupts having been so sold, had agreed to pay the plaintiff £300 a year until the trade creditors of the bankrupts should be satisfied. Having made default, the action was brought to recover the overdue instalments of £300, or, in the alternative, to recover the value of the goods seized. The Court of Appeal held that the plaintiff was entitled to recover, Lindley, L.J., who delivered the judgment of the Court, thus laid down the law. "Speaking generally, and excluding exceptional cases, when a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them, and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt the owner is entitled to recover the value of them from the debtor." This right to indemnity exists, though there be no agreement to indemnify

RECENT ENGLISH DECISIONS.

or contribute, and though there be in that sense no privity between the plaintiff and defendant, but, as pointed out in the judgment, the rule is subject to certain exceptions, *e.g.*, it may be excluded by contract—as where the person whose goods are seized is himself liable to pay the debt for which they are seized. The case of *England v. Marsden* (1 L. R. C. P. 529,) had also decided that when the owner of the goods leaves them for his own convenience where they could be lawfully seized for the debt of another—the latter in such a case was not liable to indemnify, but the soundness of this case was questioned, and the Court thought that it ought not to be followed.

ARBITRATION—COSTS TO ABIDE EVENT—PLAINTIFF SUCCEEDING ON CLAIM, AND DEFENDANT ON COUNTER CLAIM.

The case of *Lund v. Campbell* (14 Q. B. D. 821), is another decision of the Court of Appeal, affirming the judgment of the Queen's Bench Divisional Court. The question was as to what was the proper form of judgment where there is a claim and counter claim and the action is referred to arbitration, and it is ordered "that the costs of the cause and the costs of the reference and award shall abide the event" and upon the arbitration the plaintiff succeeds on his claim, and the defendant on his counter claim, and after setting off the former against the latter the balance is in favour of the defendant.

Under such circumstances the Court held that the word "event" must be construed distributively and that the judgment should be entered for the defendants with the costs of the cause, reference and award, but that the plaintiff was also entitled to the costs of all those issues on which he had succeeded.

HUSBAND AND WIFE—ACTION BY HUSBAND AGAINST WIFE—MONEY PAID BY HUSBAND FOR WIFE BEFORE AND AFTER MARRIAGE—MARRIED WOMEN'S PROPERTY ACT 1882.

The only case in the Queen's Bench Division remaining for consideration is

that of *Butler v. Butler* (14 Q. B. D. 831) a decision of Wills, J. The action was brought by a husband against his wife to recover moneys lent by him to his wife before and after their marriage, which took place in 1883; and it was held that the action would not lie for moneys lent before marriage, but that the plaintiff was entitled to recover against his wife's separate estate the moneys lent after the marriage.

None of the cases in this number of the Probate Division appear to call for any reference here.

EXPROPRIATION OF LAND FOR PUBLIC PURPOSES—TAKING MORE LAND THAN IS NECESSARY.

The first case in the Chancery Division for May to which we think it necessary to call attention is that of *Gard v. Commissioners of Sewers of the City of London* (28 Ch. D. 486), which, though a decision on the construction of certain Imperial Statutes, may nevertheless be useful as a guide in the construction of similar acts in force in this Province. Under certain statutes the defendants were authorized to expropriate land for the purpose of widening streets. Two houses adjoining a street which the defendants sought to widen belonged to the plaintiff, they were burned down and the outer walls only left standing. The defendants actually only required a strip of 5½ feet of the land for the purpose of widening the street, but they claimed the right to take the whole of the land on which the houses stood, intending to sell the surplus not required, without giving the plaintiff any option of pre-emption. This the Court held the defendants could not do, but on the contrary they were restricted from expropriating any more land than was reasonably necessary for carrying out the proposed improvement, and an injunction to restrain the expropriation was granted.

PETITION DISMISSED—DISCOVERY OF FRESH EVIDENCE—RES JUDICATA.

The case of *Re May* (28 Ch. D. 516) a decision of the Court of Appeal affirming

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Pearson, J., requires but brief notice. It is to the effect that when a petition has once been presented to the Court and dismissed on the merits, a new petition in respect of the same matter cannot be subsequently filed, on the discovery of fresh evidence, without the leave of the Court being first obtained.

**WILL—LIFE ESTATE TERMINABLE ON BANKRUPTCY—
GIFT OVER—TIME FOR ASCERTAINING CLASS.**

We now come to another decision of the Court of Appeal which also affirms the judgment of Pearson, J., *Re Bedson's Trusts* (28 Ch. D. 523), which termed upon the construction of a will whereby the testator gave a fund to trustees to pay the income to his son for life, and after his death to pay and divide the fund equally among all the children which the son should have as and when they should respectively attain twenty-one. There was also a proviso that if the son should be adjudicated bankrupt the fund and the income thereof should thenceforth immediately go and be payable or applicable to or for the benefit of the child or children of the son "in the same manner as if he was naturally dead." After the death of the testator the son was adjudicated a bankrupt. At the date of the adjudication he had two children; other children were born to him afterwards, and the question was whether the subsequently born children were entitled to participate in the gift over? and the Court held that they were subject to the contingency of their attaining twenty-one. Lindley, L.J., thus states his conclusion as to the meaning of the will: "I think that the real meaning is that in the event of the bankruptcy of the son, such son's life interest is to cease, and the children are to take the interest in the fund as in the case of such son's death; but not that the fund is to be then divided amongst a particular class of children to the exclusion of any other class. The period of distribution is not the bankruptcy, but

the death of the testator's son." The case is also noteworthy for the difference of opinion expressed by two of the learned Judges of Appeal as to the application of artificial rules of construction to wills of personalty. Brett, M.R., being of opinion that such rules have been carried too far, and "that a will, especially one of personal property, ought to be construed according to the rules of construction applicable to all documents, and not according to such artificial rules." Cotton, L.J., on the other hand, said: "I cannot agree to the departure from well-known rules of construction which apply, unless the testator has expressed a different intention by the words which he has used." In this case however, notwithstanding, the difference of opinion thus expressed they nevertheless arrived at the same conclusion as to the meaning of the will in question.

WILL—ADEMPTION OF LEGACY.

In the next case to which we think it necessary to refer, viz., *Re Pollock, Pollock v. Worrall* (28 Ch. D. 552), the law on the subject of the ademption of legacies was considered by the Court of Appeal. A testatrix, in pursuance of a request of her deceased husband who had left her his residuary estate, by her will bequeathed the sum of £500 sterling to his niece Julia "according to the wish of my late beloved husband." Evidence was adduced that the testatrix had said, in June, 1880, that she had asked the legatee if she would receive £300 down, instead of a larger sum after her, the testatrix's death, and that the legatee had answered by letter stating that she would prefer the £300 down, but no such letter was forthcoming, and the legatee denied having written any such letter. It appeared, however, from entries in the testatrix's diary that in July, 1881, she wrote to the legatee telling her that £300 had been paid into the bank for her, "being the legacy from her uncle John." On the

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part of the legatee evidence was given that in July, 1881, she had received a letter from the testatrix saying that she wished to give her £300 in order that she might purchase a clock or inkstand as a *souvenir* of her uncle John, and that she purchased the clock out of the £300, and had written to the testatrix informing her of this and consulting her as to the inscription, which was supported by an entry in the testatrix's diary to the effect that she had received a letter from legatee "telling me she had got the clock and was waiting for the inscription." Mr. Justice Pearson had held that the payment of the £300 was a total ademption of the legacy of £500 given by the will, but the Court of Appeal was of opinion that it was only an ademption *pro tanto*. Lord Selborne, who delivered the judgment of the Court, said that numerous authorities have determined that if a legacy appears on the face of the will to be bequeathed (though to a stranger) for a particular purpose, and a subsequent gift appears by proper evidence to be made for the same purpose, a presumption is raised *prima facie* in favour of ademption. But he observed, "It is not without some degree of doubt that I have come to the conclusion that although the sum given in July, 1881, is the same which in June, 1880, the testatrix contemplated giving in lieu of the £500 (which would then have been a total ademption), the lapse of more than a year without the fulfilment of that intention, is enough to prevent any satisfactory inference that the gift made in July, 1881, was intended to be a total ademption of the legacy of £500."

VENDOR AND PURCHASER—SALE BY TRUSTEE—DEPRECIATORY CONDITION.

In *Dunn v. Flood* (28 Ch. D. 586), to which we now come, the Court of Appeal affirmed the judgment of North, J., (25 Ch. D. 629). The action was brought for the specific performance of a contract for the

purchase of lands, and was resisted by the purchaser on the ground that the plaintiffs were trustees, and that the conditions under which the property had been sold were of such a depreciatory character that the sale under such circumstances amounted to a breach of trust. The sale was made subject to certain general conditions of sale relating to the building and occupation of the houses to be erected on the land, one of which required the purchaser of each lot to covenant not to carry on upon either of the said lots the trade or business of a brewer, hotel-keeper, or similar trade, following the words of a deed under which the plaintiffs claimed title. But in addition there was also a further condition that the lots were sold "subject to the existing tenancies, restrictive covenants, and all easements and quit rents (if any) affecting the same," and that the purchasers were to indemnify the vendors against the breach of any restrictive covenants contained in the abstracted muniments of title. The abstracted documents contained no other restrictive covenants than those comprised in the general conditions, and the vendors stated that they knew of no other restrictive covenants, and of no existing tenancies, easements or quit rents, affecting the property. And it was held that the condition as to existing tenancies and restrictive covenants were of so depreciatory a character as to constitute a good defence to the action. Bowen, L.J., thus states the objection to the conditions: "The trustees in the present case had a discretion to sell, but it was their duty in the first place to tell the truth; this was a duty due to themselves, their *cestui que trust*, and to the purchaser. In the second place it was not their duty to suggest any difficulty in the title that did not exist. The condition principally objected to is condition 6 (*i.e.*, the condition relating to the existing tenancies, etc.). Would a

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prudent vendor who wished to sell at a fair price insert such a condition as this? It appears to me to be full of warnings and conditions, which, although in some special cases it may be proper to insert them, yet amounted in the present instance to a suggestion of traps and pitfalls where none existed. Taking into account that there was no compensation clause, I think such a condition was calculated to frighten away purchasers." As to the right of the purchaser to resist performance of the contract on this ground, Fry, L.J., made the following observations: "It was contended that the only cases in which the Court has refused to enforce such a contract have been where the trustees selling have been defendants, and it was argued that where the vendors are plaintiffs the Court will enforce specific performance. I think such a view is abhorrent to the practice of the Court. In truth, however, the question is not reasonably open. *Rede v. Oakes* (4 D. J. & S. 505), is a distinct authority where the plaintiffs are vendors who have entered into a contract which is a breach of trust, they cannot enforce it against the purchaser."

BREACH OF TRUST—ACQUIESCENCE BY CESTUI QUE TRUST.

The following case of *Sawyer v. Sawyer* (28 Ch. D. 595) is a decision of the Court of Appeal affirming the judgment of Chitty, J., and establishes that where a trustee claims that his *cestui que trust*, who is a married woman, has concurred in a breach of trust, he must show that she acted for herself in the breach of trust, and was fully informed of the state of the case in order to entitle him to claim indemnity out of her interest in the fund for the liability she incurs in consequence of the breach. It is not enough merely to show that she consented to the breach of trust. This decision appears to conflict with the modern trend of legislation, which is all

the time striving to emancipate married women from the disabilities they were formerly subject to, and to place them on the same footing as men with regard to their property. Equity lawyers, however, do not seem to be able to rid themselves of the notion that a woman, in spite of the theories of modern legislators, needs special protection, and that acts which would bind a man do not necessarily bind a woman. Thus Fry, L.J., who gave the judgment of the Court was compelled to admit that while in the case of a man of full years consenting to a breach of trust the Court would presume him to be acting with a full knowledge of all the circumstances, yet in the case of a *feme covert* no such presumption exists in favour of the trustee whose primary duty is to protect the fund for her benefit.

SEPARATION DEED—ACCESS TO CHILDREN—REMOVAL OF CHILDREN OUT OF JURISDICTION.

The next case, *Hunt v. Hunt* (28 Ch. D. 606), requires but a brief notice here. The question was simply whether a husband who had covenanted in a separation deed to allow his wife access to his children, for at least one day in every fortnight, could be restrained from removing the children to Egypt whither he had been ordered as a medical officer in the army. Pearson, J., granted an injunction restraining the removal, but on appeal his decision was reversed on the ground that no case was made that the defendant was removing the children for the purpose of preventing his wife having access to them, and the covenant did not bind him to keep them in a place where she could conveniently have access to them.

SOLICITOR—STRIKING OFF ROLL—JURISDICTION OF COURT OF APPEAL.

In the following case of *Re Whitehead* (28 Ch. D. 615), a motion was made to the Court of Appeal to strike a solicitor off the rolls. The Court of Appeal had directed the official solicitor to take pro-

RECENT ENGLISH DECISIONS.

ceedings against the solicitor who, from his evidence given in a cause which had been before the Court by way of appeal, appeared to have been guilty of gross misconduct, and the question was discussed whether the Court of Appeal could strike him off the rolls or whether the proceedings for that purpose should not have been instituted in one of the Divisions of the High Court. The Court of Appeal, though not seeing fit to exercise the jurisdiction, nevertheless, were unanimous that they had the power to do so. The solicitor not having derived any pecuniary benefit from his misconduct, and being in reduced circumstances, and not having taken out his certificate for three years, the Court, instead of striking him off the rolls or suspending him, restrained him from renewing his certificate without the leave of the Court.

INCUMBRANCE—PRIORITY—LEGAL ESTATE.

Passing by two or three cases which do not appear to need any notice, we come to the case of *Newman v. Newman* (28 Ch. D. 674), which is an illustration of the well-known maxim of equity, that "where the equities are equal the law must prevail." One Brown was the owner of an undivided three-eighths of a certain leasehold, as to one moiety thereof for himself, and as to the other in trust for one Edwin Newman. Edwin Newman assigned his share in this leasehold, and also a policy of life insurance to his mother-in-law, Mrs. Armstrong, as security for £5,700. Subsequently Edwin Newman became indebted to Brown, and he and Mrs. Armstrong thereupon by deed, reciting the previous assignment to the latter, conveyed the leasehold and policy to Brown to secure £3,180, and subject thereto for Mrs. Armstrong. Edwin Newman died.

The action was brought by one of his children claiming to recover the value of

his interest in the leasehold and life policy as one of the *cestuis que trustent* under his marriage settlement, whereby it was claimed that the leasehold and policy had been settled by Edwin Newman prior to the assignment to Brown, it being claimed that the £5,700 due to Mrs. Armstrong was so due to her as a trustee of the settlement. Brown alleged he took the assignment without notice of the settlement, which the Court on the evidence held to be the fact. Under these circumstances it was held by North, J., that Brown having the legal estate, and having no notice of the plaintiff's alleged prior equity at the time he took security for his debt from Edwin Newman, was entitled to priority over the plaintiff.

QUIA TIMET—INJUNCTION—NUISANCE.

The case of *Fletcher v. Bealey* (28 Ch. D. 688) is the next case which seems to call for observation here, and shows the principle on which the Court acts in entertaining *quia timet* actions for the purpose of restraining threatened injuries. The plaintiff carried on business as a paper manufacturer on the banks of the river Irwell, the water of which he used to a large extent in his business, and it was of great importance that it should be free from impurities. The defendants were alkali manufacturers, and were depositing on the banks of the river a quantity of refuse known as "vat waste" from which a highly noxious liquid was liable to percolate, and the plaintiff, being apprehensive that this liquid would get into the stream, brought the action to restrain the deposit of the vat waste near the river. No actual damage had been done. Pearson, J., thus stated what he considered to be the principle on which the Court should act in such cases: "There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should

RECENT ENGLISH DECISIONS.

almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shewn that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it, if relief is denied to him in a *quia timet* action." Applying this principle to the case, he came to the conclusion that the action was premature, and dismissed it without prejudice to any future proceedings by the plaintiff in case of actual injury or imminent danger.

HUSBAND AND WIFE—JOINT INVESTMENTS—WILL OF MARRIED WOMAN.

In Re Young, Trye v. Sullivan (28 Ch. D. 705), was a special case stated for the opinion of the Court, as to who was entitled to certain moneys which had been kept in a bank in the joint names of a husband and wife, and also certain investments made in their joint names out of the moneys so kept at the joint account. The moneys kept at the joint account were principally derived from the wife's separate estate. The wife survived her husband, having executed a will during coverture. Pearson, J., before whom the case was argued held that the balance of the joint account at the bank, and the investments made in the joint names of the husband and wife, survived to the wife, but did not pass under her will. He considered the proper inference to be drawn was, that by placing the moneys to the credit of the husband and wife jointly, the wife intended to sink all idea of their being separate estate, and that the investments stood in the same position.

The case which follows, viz.: *In Re Price, Stafford v. Stafford* (28 Ch. D. 709) is another decision as to the effect of the will of a married woman. It will be remembered that the House of Lords in

the case of *Wilcock v. Noble* (7 H. L. C. 580) decided in effect that the 1 Vict. c. 26, sec. 24 (see R. S. O. c. 106, s. 26) which provides that "Every will shall be construed with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator unless a contrary intention appears by the will," has not the effect of making valid the will of a married woman which was invalid at the time of its execution, notwithstanding that it would have been valid if executed at the time of her death. The only question *In re Price* was whether the Married Women's Property Act of 1882 (see 47 Vict. c. 190) had made any difference in the law, and Pearson, J., held that it had not, and that consequently property acquired by a married woman after her husband's death does not pass by a will made by her whilst under coverture. The power to make a will during coverture, does not extend to property she may acquire after she becomes discoverable.

VENDOR AND PURCHASER—VENDORS' RIGHT TO RESCIND.

The only case remaining for consideration in the May number of the Chancery Division is that of *Hardman v. Child* (28 Ch. D. 712), which turns upon the construction of a condition of sale, which provided that if any objection or requisition as to the title or abstract or conveyance should be insisted on, and the vendors should be unable or unwilling to remove or comply therewith, they should be at liberty to annul the sale. The abstract delivered to the purchaser showed that the conveyance to the vendors' testator was of the land, together with a wall on the east side of it, "which wall is to be ever hereafter repaired, and kept in repair" by the testator, his heirs and assigns. This obligation was not mentioned in the particulars and conditions of sale, and the purchaser did not know of it until the

RECENT ENGLISH DECISIONS—RECENT ENGLISH PRACTICE CASES.

delivery of the abstract. He accepted the title, and tendered a draft conveyance of the land with the wall, omitting all reference to the obligation to repair. The vendors' solicitors added the words "subject to and with the liability for ever to repair the wall." The purchaser would not agree to the addition, and the vendors thereupon gave notice of rescission; whereupon the purchaser brought this action for specific performance, claiming the right to a conveyance without the additional words. Pearson, J., says: "If the obligation to repair the wall did run with the land, it would bind the purchaser, whether there was any reference to it in the conveyance to him or not. If it did not run with the land, the vendors had no right to insert any words in the conveyance imposing the obligation on the purchaser." As to the question of the right to rescind he said: "A condition of this kind is in my opinion intended only to meet the case of a purchaser insisting on an objection which the vendor is absolutely unable to remove; or if not absolutely unable, the removal of which would throw upon him such an amount of expense as it would be unjust that he should be compelled to bear."

REPORTS.

ENGLAND.

RECENT ENGLISH PRACTICE CASES.

MCLILWRAITH V. GREEN.

Payment into court—Denial of liability—Action for several breaches of contract—Payment into court in respect of one breach—Acceptance in satisfaction of all demands—Costs—Rules (1883). Ord. 22, r. 6. 7. (Ont. Rules 215, 218.)

In an action for breach of contract assigning two distinct breaches, the defendants pleaded denying the breaches and paid money into Court in respect of one of the breaches. The plaintiffs gave notice under Ord. 22 r. 7, that they accepted the money paid into Court in full satisfaction of the causes of action in the statement of claim.

Held, affirming decision of Q. B. D. (13 Q. B. D. 897), that the plaintiffs were entitled to the costs of action without proceeding to judgment. [C. A. 14—Q. B. D. 766.]

BRETT, M.R.—"For the defendants it has been urged that the plaintiffs ought, in express terms, to have abandoned the prosecution of all the causes of action, and that they ought to have given a notice of discontinuance, or withdrawal of that breach in respect of which the money was not paid in by the defendants. . . . It seems to me, that the notice actually given by the plaintiffs, and the notice in the form suggested are exactly equivalent. . . . I dissent from the view of Field, J., in *Crosland v Routledge* W. N. (83) 228."

BARKER V. LAVERY.

Appeal to House of Lords—Stay of execution.

Execution for costs, pending an appeal from the Court of Appeal to the House of Lords, will not be stayed, unless evidence be adduced to show that the appellant will be unable to recover such costs from the respondent should the appeal be successful. [C. A. 14—Q. B. D. 769.]

EARL OF SELBORNE, L.C.—"The defendant is not entitled to have the application granted as a matter of course. Evidence ought to have been adduced to show that the plaintiff would be unable to repay the costs if he should be unsuccessful before the House of Lords. As to the request for time to make an affidavit about the plaintiff's means, we cannot accede to it; those who apply for a stay of execution must come before us prepared with all necessary materials."

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Ct. Ap.]

IN RE GILBERT, GILBERT V. HUDLESTONE.

Appeal on question of costs—Special leave—
J. A. 1873, s. 49—(Ont. J. A. s. 32.)

When leave is given to appeal from an order as to costs which are left by law to the discretion of the judge, the Court of Appeal will still have regard to the discretion of the judge, and will not over-rule his order, unless there has been a disregard of principle, or misapprehension of facts.

[C. A.—28 Ch. D. 549.

BAGGALLAY, L. J.—“When the Court of Appeal is acting under that section (*i.e.*, s. 49) it must still recognize the discretion of the judge, as in other matters which are left to his discretion. If there has been any violation of principle, or misapprehension of facts the Court will interfere, but not otherwise.”

DOBLE V. MANLEY.

Foreclosure action—Subsequent incumbrance—One period named for redemption.

In a foreclosure action, one day will be fixed both for the mortgagor, and subsequent incumbrancers, to redeem the plaintiff.

[Chitty, J.—28 Ch. D. 664.

CHITTY, J., said that he had consulted KAY, J., and PEARSON, J., and that they were all unanimously of opinion that when defendants did not appear, one time only should be fixed for redemption. . . . “If any subsequent mortgagee appeared, and claimed to have successive periods fixed, the Court would have to consider whether he was entitled to them.”

IN RE WARD.

Solicitor and client—Costs—Taxation—Assignee.

Whether an assignee of one or several bills of costs can obtain an order for taxation under 6 & 7 Vict. c. 73, s. 37 *revers*.

If an assignee can apply for an order for taxation, he must make a special application; he is not entitled to an order of course.

Where it is sought to tax one only of several outstanding bills of costs, the application must be a special application.

[Pearson, J.—28 Ch. D. 719.

PEARSON, J.—“In my opinion an order to tax one only of several bills of costs ought not to be obtained as a common order. A person ought not to apply for taxation piecemeal, but he ought to ask to have all the outstanding bills of costs against the client taxed together, otherwise there would be a risk of doing the greatest injustice to one side or the other. If it is possible for an assignee of costs

to obtain an order for taxation, in my opinion he cannot obtain a taxation of one bill of costs, only by means of the common order, even if only one of the bills of costs have been assigned to him; he can only do so by means of a special application. The order to tax must be discharged with costs.”

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

BEATTY V. THE NORTH-WEST TRANSPORTATION COMPANY.

Incorporated Company—Directors of Company—Stockholders.

J. H. B., one of the defendants, a director of the defendant company, personally owned a vessel “The United Empire,” valued by him at \$150,000; and was possessed of the majority of the shares of the company, some of which he assigned to others of the defendants in such numbers as qualified them for the position of directors of the company, the duties of which they discharged. Upon a proposed sale and purchase by the company of the vessel “The United Empire” the board of directors (including J. H. B.), at their board meeting adopted a resolution approving of the purchase by the company of such vessel; and subsequently at a general meeting of the shareholders, including those to whom J. H. B. had transferred portions of the stock, a like resolution was passed, the plaintiff alone dissenting.

Held, reversing the judgment of the Court below, 6 O. R. 300, that although the purchase on the resolution of the directors alone might have been avoided, the resolution of the shareholders validated the transaction, and that there is not any principle of equity to prevent J. H. B. in such a case from exercising his rights as a shareholder as fully as other members of the company.

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Ct. Ap.]

ARMSTRONG V. FARR.*Equitable Assignment.*

On the occasion of the defendant effecting a purchase of land in which the plaintiff had some interest, and which he refused to release until assured that part of the purchase money to be paid by the defendant to his vendor would be handed to one H., a solicitor acting in the matter, out of which the amount due plaintiff was to be paid, whereupon the plaintiff executed a conveyance of his interest which was duly registered. The defendant and his vendor made other arrangements for discharging all the purchase and obtained a deed of the property.

Held, affirming the judgment of the Court below, that, under the circumstances, an equitable assignment had been made of so much of the purchase money as was due to the plaintiff, and that the defendant was bound to pay the amount to the plaintiff—BURTON, J.A., dissenting.

MOOREHOUSE V. BOSTWICK.*Partnership and personal creditors—Dissolution of partnership.*

L. A. M. made an assignment of all his property to the defendant in trust to convert the same into money, and out of the proceeds to pay and satisfy all his debts and liabilities, ratably and proportionably, without preference and "recognizing such liens, claims, charges and priorities as the law directs." Some of the creditors were creditors of L. A. M. alone, whilst others were creditors jointly of him and his brother with whom he had for some time carried on business, and who had assigned to L. A. M. all his interest in the partnership effects, who covenanted to pay off all the partnership creditors.

Held, reversing the judgment of the Court below, 5 O. R. 104, that in respect of such portion of the assets as had been the joint property of the partners the partnership creditors had a claim to be paid in priority to the separate creditors of L. A. M.

BRUSSELS V. RONALD.*Agreement to carry on works—Bonus by municipality—Failure to carry on the work—By-laws—Want of consideration for mortgage.*

The municipal corporation of Brussels agreed to grant the defendant \$20,000 by way of bonus to enable him to establish a manufactory of steam fire engines and agricultural implements which in pursuance of the by-law in that respect he stipulated to carry on for twenty years, and to secure the due performance of such agreement executed a mortgage on certain real estate. Having failed to carry on the works for the stipulated period the municipality instituted proceedings to foreclose, but

Held, affirming the judgment of PROUDFOOT, J., 4 O.R. 1, that the plaintiffs could only obtain an enquiry as to the damages sustained by reason of the breach, and have a lien on the estate for the amount found due.

The defendant subsequently, without any reference to the by-law, and without any consideration, executed another mortgage on the same property for \$3000.

Held, also (affirming the judgment of PROUDFOOT, J.), that the municipality was not entitled to any relief on this mortgage.

PETRIE V. GUELPH LUMBER CO.*Deceit—Representation untrue in fact, though alleged to have been believed to be true.*

The defendants other than the company being directors of the defendant company, made certain representations concerning the affairs of the company, which they believed to be true, but which were not in fact true, and procured the plaintiff and others to take stock in the company. The company was at the time insolvent.

Held, affirming the judgment of the Court below, 2 O. R. 218, in an action for deceit, that the defendants were not liable.

McCarthy, Q.C., and Plumb, for the appellants.

Robinson, Q.C., and Cassels, Q.C., for respondents.

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Ct. Ap.

COTTINGHAM V. COTTINGHAM.

Sale and purchase of lands—Sale by auction—Excess in quantity.

The judgment reported 5 O. R. 704 was reversed on appeal, the Court being of opinion, PATTERSON, J.A., dissenting, that the sum of \$3,100 was bid for the premises, stated to be 100 acres more or less.

Per BURTON, J.A.—The price per acre was only a mode of arriving at the sum bid, assuming the lot to contain 100 acres.

TOWERS V. THE DOMINION IRON CO.

Sold by sample—Right to reject goods.

The defendants bought by sample from W., who acted as a broker between them and the plaintiff, a quantity of cotton droppings or waste, to be delivered f.o.b. at St. Catharines, and by the directions of the defendants the same were forwarded to their branch house at Cincinnati, where it was alleged they were found to be not equal to the sample. In the meantime, however, the defendants had accepted a bill drawn on them by the plaintiff for the price of the waste.

Held, affirming the judgment of SENKLER, J.C.C., that the proper place to have inspected the goods was at St. Catharines, and that if even the goods were not up to sample, it formed no ground of defence to the action on the bill.

Semle, *per* HAGARTY, C.J.O., that the only remedy in the case in favour of the defendants was by cross action.

WALMSLEY V. SMALLWOOD.

Appeal for costs—Disclaimer—Practice.

J., one of the defendants, had bid for and became the purchaser of a lot of land sold under the provisions of the R. S. O. ch. 216, by certain parties claiming to be trustees of the Coloured Wesleyan Church, whose proceedings in respect of such attempted sale were impeached in the action to which J. was made a party defendant, although he avowed his willingness to withdraw from the purchase, and by his answer disclaimed "all interest in the result of this suit, and no effort has been

made by him to have said sale carried out, as he was aware that the same would have to be first confirmed by the members of the said church." At the trial judgment was given setting aside the sale, and ordering the defendants generally to pay costs.

Held, reversing the judgment of the Court below, that under the circumstances a formal disclaimer was not required, and J. was ordered to be paid his costs of the appeal, although the action in the Court below was dismissed as against him without costs.

COSGRAVE V. STARRS.

Guarantee—Effect of death of one of the partners to whom a guarantee is given—Notice to determine guaranty.

The judgment in this action, reported in 5 O. R. 189, was varied on appeal by limiting the liability of the defendant under his guaranty to C. & Co. to what was due by Q., on the 5th of April, 1882, when notice to discontinue supplying him with goods was given to C. & Co. by the guarantee.

BUTTERWORTH V. SHANNON.

Principal and agent—Purchase of lands by agent—Ratification.

The plaintiff paid \$1,000 to the defendant for the purpose of investing the same in Manitoba lands for the plaintiff in case the defendant thought it advisable, if not, the money to be returned. The defendant did not pursue such authority, but purchased ten lots in Portage la Prairie. Two of these lots defendant alleged he purchased for the plaintiff, but there was no evidence of this other than the defendant's own statement, the conveyance of the ten lots having been taken in the defendant's name. The plaintiff subsequently agreed to take these two lots upon the representation of the defendant that they equalled the other lots in size, etc., which proved to be incorrect.

Held, affirming the judgment of the Court below, that the adoption of the purchase by the plaintiff having been made by reason of the defendant's misrepresentations as to size and value of the lots, the plaintiff was not bound thereby, and was entitled to recover back the amount so entrusted to the defendant.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

CAREY V. THE CITY OF TORONTO.

Sale of lots by a plan showing streets and lanes.

The mere fact of the owner of lands selling them by a plan showing streets and lanes thereon, does not bind him to continue such streets and lanes unless a purchaser is materially inconvenienced by the closing up of any of them.

A sale by auction was announced of lots, the advertisement stating that "lanes run in rear of the several lots." At the auction the plaintiff purchased a lot on the north side of Baldwin Street, which ran to a lane running from east to west, and a lane also ran in rear of other lots which joined at right angles the lane in rear of the plaintiff's lot.

Held, that as the plaintiff had ready access to the streets by the lane on which his lot abutted, he could not prevent the vendors from closing up any other lane upon the property.

CHANCERY DIVISION.

Boyd, C.]

[April 22.]

MORRISON V. MORRISON ET AL.

Will—Construction—Speaking from death—Contrary intention—After acquired property—R. S. O. c. 106, s. 26.

A testator by his will, dated May 19th, 1873, devised to R. M. "the property on H. Street," and gave "all the residue of his estate real, personal and mixed, which he should be entitled to at the time of his decease to A. M." At the date of the will he possessed only one property on H. Street called the Red Lion Hotel. He subsequently acquired other property on that street, consisting of three houses and lots.

Held, that, notwithstanding R. S. O. c. 106, sec. 26, by which a will is made to speak from the death, "unless a contrary intention appears by said will, the after-acquired property on H. Street did not go to R. M. but fell into the residue." The testator had expressed his intention with reference to all land acquired by him after the date of his will by appropriate words in that will, and it would be going contrary to that intention to declare that some after-acquired property

should be withdrawn from the residuary clause, and held to pass under the prior specific devise.

Martin, Q.C. and *Waddell*, for plaintiff.

Furlong, for the defendants, the Swans.

Parker, for the defendant, R. Morrison.

Laidlaw, for the defendant, A. Morrison.

Boyd, C.]

[May 11.]

MITCHELL V. GORMULLY.

Partnership—Syndicate—Right of one partner to deal with his share—Profits.

M. & G. met and agreed to jointly purchase 150 acres of land and to sell it in lots or perhaps *en bloc* to a syndicate, if one could be got up. Both parties knew that others were interested under each of the two principals. M. had one-third interest and G. had two-thirds. No syndicate was got up to take the whole, and G. telegraphed M. that he was going to arrange a syndicate for two-thirds, and he formed a syndicate of eight persons, of whom he was one, to purchase his two-thirds interest, and obtained a large profit thereon. This arrangement was made in writing and recited that G. was seized in fee of the lands and had executed a declaration of trust of one-third in favour of M., and executes this declaration as to the remaining two-thirds. A quit-claim deed was afterwards executed by M. in favour of G., and a declaration of trust as to one-third in favour of M. was signed by G. In an action by M. for a share of G.'s profit it was

Held, that there was no sale of any of the lots that belonged to M. The two-thirds had not been disposed of so that they had passed out of the partnership though as to them there might be a subpartnership; there had been no dealing with the joint property of the partnership, but only of the individual interest of one partner; he had sold some portion of his individual share and no injury had resulted to his partner, and even if any had it would be no more than one of the inevitable concomitants attendant upon the right of one member to deal as he pleases with his share of the partnership concern. The action was therefore dismissed with costs.

McCarthy, Q.C., and *C. H. Ritchie*, for defendant.

S. H. Blake, Q.C., for plaintiff.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.

Full Court.]

[May 21.]

KING V. ALFORD.

Mechanic's lien—Railway buildings—Engine house.

Held, following *Breeze v. The Midland Railway Co.*, 26 Gr. 225 (PROUDFOOT, J., dissenting), that a mechanics' lien does not attach upon an engine house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and such engine house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanics' lien.

There is nothing in the Mechanic's Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution, and *ESTEN, V.C.*, decided in 1862 that no sale of lands and buildings of a railway could be effected under process of execution: *Peto v. Willand Railway Co.*, 9 Gr. 458. That has ever since been deemed well settled law in this Province. It is not correct to say that a mechanic's lien is analogous to a vendor's lien—it more closely resembles the lien of an execution creditor.

Per PROUDFOOT, J., the statute was intended to place mechanics on a more favourable footing than other creditors. General creditors have a right to sue for their debts upon the common law liability of the company, but they had no specific charge. Mechanics were given a specific lien on the property. Their case is not the same then as that of general creditors, and their right ought not to be measured by what could be realized upon an execution. The true gauge of their right I think is that which the name expresses, a lien, and their remedies such as a lien-holder might enforce, and it is immaterial whether the lien be created by mortgage or contract or imposed by statute. There seems no distinction in principle between their position and that of an unpaid vendor for land sold to the railway. And it has been settled by numerous decisions that to enforce such a lien an order may be made for the sale of the railway.

RICHARD ET AL V. STILLWELL.

Guarantee—Form of—How sent and received—Names of parties.

C. A. E. carried on business under the name of S. P. Co., became indebted to the plaintiffs and sold out to the defendant. The defendant then ordered goods from the plaintiffs which were supplied, and at the same time a demand was made for an acknowledgment of C. A. E.'s indebtedness to the plaintiffs. The defendant subsequently gave a further order for goods, but the plaintiffs declined to supply them until the acknowledgment was forthcoming. Soon afterwards the plaintiffs received in an envelope, addressed to their firm, an acknowledgment in these words:

"LAKE SUPERIOR, ONT.

"July 4th, 1883.

"Gentlemen,—I beg to inform you that I have assumed all liabilities of the 'S. P. Co.' lately carried on by Mr. C. A. E., and am responsible to the amount contracted by him up to July 24th, 1882. Kindly ship cases immediately.

Respectfully yours.

" (Signed) C. J. S."

The envelope was lost but its receipt, superscription and subsequent loss were proved.

Held, that the plaintiffs were entitled to recover from the defendant the price of the goods sold to C. A. E.

W. M. Hall, for the plaintiff.

G. H. Watson, for the defendant.

PRACTICE.

Osler, J. A.]

[Dec. 19, 1884.

EXCHANGE BANK V. BARNES.

Security for costs—Case in Court of Appeal.

The plaintiffs having recovered judgment in the action, the defendant appealed to the Court of Appeal, and there moved to compel the plaintiffs to give security for costs, on the ground that the latter resided out of the jurisdiction, and had since the recovery of judgment ceased to carry on business in, and withdrawn their assets from this Province.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Under these circumstances the motion for security was refused.

R. Martin, Q.C., for the motion.

Laidlaw, contra.

Ferguson, J.]

[March 30.]

RE HINDS, HINDS V. HINDS.

Maintenance—Money in court—Lunatic not so found.

Holman, for one Beaty Hinds, moved on petition for an order for payment out of Court to the petitioner from time to time of the moneys to which Charles Hinds was entitled for the support and maintenance of the said Charles Hind, who, as it appeared from the affidavits and papers filed, was a lunatic, though not so found, and was living with the petitioner, his brother.

John Hoskin, Q.C., official guardian ad litem, for the lunatic.

FERGUSON, J.—Is there any authority for such an order where the party has not been declared to be a lunatic?

Holman cited *Re Bligh* 12 Ch. D. 365; *Re Brandon*, 13 Ch. D. 773.

FERGUSON, J., made an order for payment to the petitioner, out of the lunatic's share of moneys in Court, of the costs of the application, and of an annual allowance to be expended for the maintenance of the lunatic.

Mr. Dalton, Q.C.]

[April 28.]

Rose, J.]

[May 4.]

SMITH V. SMITH ET AL.

Notice of appeal—Effect of.

A notice of appeal to the Court of Appeal is not an initiation of the appeal, and therefore where a notice was given, but was not followed up by the appellant giving security as required by sec. 38, O. J. A.,

Held, that there was no appeal pending, and a motion to set aside the notice of appeal or to dismiss the appeal was refused.

F. W. Hill, for the motion.

R. A. Porteous, contra.

Ferguson, J.]

[May 13.]

COTTINGHAM V. COTTINGHAM.

Infant plaintiffs—Next friend—Appeal to Supreme Court of Canada—Indemnity against costs.

Where the judgment of the Court of Appeal was adverse to the infant plaintiffs, and their next friend was desirous of carrying the case to the Supreme Court of Canada, and was advised by counsel so to do, and where it appeared that one of the judges in the Court of Appeal had dissented from the judgment of the Court, an order was made protecting the next friend out of the infants' money in Court in respect of the costs of the appeal.

Watson, for the next friend.

Ferguson, J.]

[May 13.]

HERRING V. BROOKS.

Action in Chancery Division—Jury notice—Transferring action.

In an action for the price of goods sold and delivered, begun in the Chancery Division, the defendant's jury notice, which had been struck out by the order of the Master in Chambers, was on appeal restored, and the action was transferred to the Queen's Bench Division.

Masse v. Masse, ante p. 179, not followed. owing to the views expressed in the Court of Appeal in *Pawson v. The Merchants' Bank* (not yet reported).

Watson, for the appeal.

W. A. Reeve, contra.

Rose, J.]

[May 19.]

ROSENHEIM V. SILLIMAN.

Examination of witnesses before trial—Rule 285, O. J. A.

The decision of the Master in Chambers, *ante p. 178*, was reversed on appeal as to the examination before the trial of the clerk who accepted the draft sued on in the defendant's name.

Ogden, for the appeal.

Holman, contra.

[Prac.]

NOTES OF CANADIAN CASES

[Prac.]

Rose, J.]

[May 19.]

CARTER V. BARKER.*Dismissing action—Want of prosecution.*

The pleadings were closed six weeks before the commencement of the assizes, but the plaintiff's solicitors did not serve notice of trial in time for such assizes because they were waiting to hear from the plaintiff whom they had notified that they would not proceed unless certain costs were paid. On the last day for serving notice of trial, about eight o'clock in the evening (service after four not being good), the plaintiff's solicitors asked the defendant's solicitor to accept service of notice of trial, but the latter declined to do so, and afterwards moved to dismiss the action for want of prosecution.

Held, that if the plaintiff, without good excuse, neglect to proceed with the action the Court will not, as of course on his mere undertaking to speed the action and paying costs, refuse to dismiss; but, under the circumstances above set out, an order of the Master in Chambers refusing to dismiss and permitting the plaintiff to proceed, was affirmed on appeal.

Aylesworth, for the appeal.

R. A. Porteous, contra.

Rose, J.]

[May 22.]

ROBERTS V. LUCAS.*Order dismissing action—No bar to subsequent action—Rule 255, O. J. A.*

An appeal from the order of the local judge at Hamilton, in Chambers, made under Rule 255, O. J. A., dismissing the action for want of prosecution, and refusing to insert in the order a clause reserving leave to the plaintiff to bring a fresh action, was dismissed.

Held, that the order was not a dismissal on the merits, and not a bar to a subsequent action for the same cause.

Holman, for the appeal.

A. Bruce, contra.

Boyd, C.]

[May 26.]

**PAWSON ET AL. V. THE MERCHANTS' BANK
ET AL.***Production of documents—Privilege.*

The plaintiffs were allowed to read, upon a motion for a better affidavit of documents, the depositions of the Assistant General Manager of the defendants, the Merchants' Bank, taken for use upon an injunction motion.

G. was general solicitor for the defendants, the Merchants' Bank, and was also acting in the transactions in question for other parties, and had himself agreed to endorse certain notes which were in question, and was negotiating actively much of the whole transaction.

Held, that letters written by G. to the Merchants' Bank, in reference to the transactions in question, were not privileged from production.

Moss, Q.C., and *Hoyles*, for the Merchants' Bank.

Shepley, for the plaintiffs.

The Master in Chambers.]

[May 27.]

MCCALLUM V. MCCALLUM.*Interlocutory judgment—Irregularity—Claim for injunction.*

Where the endorsement on the writ of summons claimed, in addition to pecuniary damages, an injunction restraining the defendant from disposing of certain goods, an interlocutory judgment signed by the plaintiff for default of appearance, was set aside as irregular.

Holman, for the motion.

Hoyles, contra.

BOOK REVIEW—OBITUARY.

BOOK REVIEWS.

GENERAL RULES AND ORDERS of the Courts of Law and Equity of Ontario, passed prior to Ontario Judicature Act, 1881, and now in force, with the Rules passed since August 21, 1881, and the Tariffs of the High Court of Justice and the County Courts, with Notes by George Smith Holmested, Registrar of the Chancery Division. Vol. II. Toronto: Rowsell & Hutcheson, 1885.

A little more than a year ago the first volume of "Holmested's Rules and Orders" was published. The profession have been eagerly awaiting the arrival of the second volume, and the expectations raised by the first have not been disappointed by the one now before us.

The latter comprises the former Common Law Rules, the Election Rules—Parliamentary and Municipal—the Rules of the Court of Appeal, as well as the additional Rules of the Supreme Court passed since the Judicature Act came into force, together with the present tariffs of solicitors' and counsels' fees of the High Court and the County Courts. Mr. Holmested has adopted the same method with regard to the Common Law Rules which he followed in his first volume when dealing with the Chancery Orders. He has, whenever he considered a rule to be in force, printed it in full, and when it is considered not to be in force he has given merely a brief note of its purport.

The idea that the Judicature Act and Rules are intended to constitute a complete code of practice, which at one time prevailed in the minds of some, has, we believe, been by this time pretty well exploded, and Mr. Holmested, by his careful review of the Rules and Orders of the former Courts of Law and Equity, has shown how very largely the practice continues to be governed thereby. It is obviously therefore just as necessary for the practitioner to be familiar with the Rules and Orders of the former Courts which continue in force, as it is for him to be conversant with the Judicature Rules.

We are glad to observe that Mr. Holmested has obviated one objection which sometimes lies against the publication of a law book in more than one volume by appending to the second volume a complete index of the contents of both volumes, and also a complete table of cases cited in either volume. As showing the amount of labour expended on the work the latter table includes some 3,000 cases. Our author with his accustomed industry and accuracy has not failed to give us a full addenda, and this is so printed as to leave alternate blank pages for notes by diligent students and practitioners.

The whole of the Rules and Orders included in this volume are fully and evidently very carefully annotated. We know of no one more competent for the task than Mr. Holmested. He has done his work well, and his book is one which no practitioner can afford to do without.

The book is got out in excellent form, both as regards paper and printing, in fact, almost the best specimen of law publishing we have seen in Canada, and is a credit to the well-known house of Rowsell & Hutcheson.

OBITUARY.

Since the issue of our last number the profession has had to deplore the loss of one of the most promising of its younger members. Mr. T. S. Plumb, from the time he commenced the practice of his profession in this Province, had been steadily advancing in reputation as a conscientious worker and an able lawyer. As a member of one of the leading firms in Toronto, his future success seemed to have been assured. Mr. Plumb was educated at Rugby, proceeding from there to Oxford, and took his degree from Balliol College, having obtained honours at both public examinations. On leaving Oxford Mr. Plumb was called to the English Bar, and very shortly afterwards returned to his native Province, commencing the practice of his profession at Toronto. It is to the zeal with which he threw himself into his professional work that many attribute his early death. Few have acquired so excellent a reputation in so short a time.

LAW SOCIETY.

THE following Rule was passed by Convocation last term:—"Ordered, that section 4 of the Rules for Examination, passed on the 26th December, 1882, be amended by inserting the words "at least 29 per cent. of the marks obtainable on the paper on each subject," and between the words "obtain" and "at least," where these words first occur in the second section.

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DIARY FOR JUNE.

- 1. Mon.....Magna Charta signed 1215.
- 2. Wed.....Burton & Patterson, J.J.C., A., sworn in, 1874.
- 3. Thur.....Lord Dalhousie, Governor-General, 1820.
- 4. Sat.....Accession of Queen Victoria.
- 5. Sun.....3rd Sunday after Trinity. Galt, J., sworn in, 1869.
- 6. Mon.....Hudson's Bay Terr. transferred to Dominion, 1870.
- 7. Sun.....4th Sunday after Trinity. Queen Victoria crowned, 1837.
- 8. Tues.....John B. Robinson, Lieut.-Governor, Ont., 1880.

TORONTO, JUNE 15, 1885.

We have not heard very much lately of abolishing the death penalty in cases of murder. In Minnesota it has recently been restored. A liberal use of the halter by Judge Lynch made life possible on the western frontier not many years ago, and the same view is being taken in the more civilized portions of the United States.

The world keeps moving on. So far the lay press only, and until very recently only a very small part of that, has indulged in pictorial aids to add interest to its columns, to add subscribers to its subscription list, or to convey information. The last departure, for some one or more of the reasons aforesaid, is on the part of the *Central Law Journal*, which leads off with a portrait of the well-known legal author Joel Prentiss Bishop, and in a subsequent issue portrays the less comely lineaments of Mr. Broadhead, the first President of the American Bar Association. We confess that we received a

shock at the time, but Indian imperturbability becomes the man of the last half of the nineteenth century—expect anything, and be surprised at nothing.

THE defeat of Mr. Justice Cooley who was recently a candidate for the Supreme Bench of Michigan has again brought into prominence, not to say disrepute, the elective system. Judge Cooley is said, by an exchange, “as a constitutional lawyer, to take rank by the side of Story and Marshall; as a writer upon constitutional law he is superior to Story. His legal judgments surpass those of Story in brevity and diction; they equal those of Marshall in diction and massive reasoning, and greatly surpass them in learning,” etc. Yet this eminent man and jurist of world-wide celebrity was defeated “by a political combination having at the head of their ticket a man unknown to the legal profession outside of Michigan.”

FROM the case of the *Bank of British North America v. The Western Assurance Co.* recently heard by way of appeal from the taxation of the local taxing officer at Brantford, it appears that the Legislature have not succeeded in giving unlimited powers over counsel fees to the local taxing officers, as was possibly intended by 48 Vict. c. 13, s. 22. That section provides that “subject to any rules of Court which may hereafter be made in this behalf, the deputy clerks of the Crown, local

ADMINISTRATION OF REAL ASSETS.

masters of the Supreme Court, and local registrars respectively, shall, in actions begun or pending in their offices, be entitled to tax all bills of costs, including counsel fees; subject only to appeal to a judge of the High Court." This, the Chancellor held, does not give the local officers power to allow increased counsel fees beyond \$20 to senior counsel and \$10 to junior counsel. Whenever increased fees are sought the fiat of one of the taxing officers in Toronto must be obtained, as prescribed by item 164 of the tariff. We understand that the taxing officers in Toronto have come to the conclusion not to grant any fiats for increased fees except upon notice to the opposite party.

ADMINISTRATION OF REAL ASSETS.

A BILL has been introduced in the British House of Commons providing for the administration of real assets. The bill provides that "when any person shall die seized of, or entitled to any estate or interest in any lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, copyhold, or of any other tenure, the same shall, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representative from time to time, and subject to the payment of his debts." It further provides that the executor or administrator "shall have power to dispose of, and otherwise deal with, all real property vested in them by virtue of this Act, with all the like incidents, but subject to all the like rights, equities and obligations as if the same were personal property vested in him."

Bills having a similar object, it will be remembered, were introduced by the Attorney-General and Mr. Ermatinger, M.P.P., during the recent session of the

Provincial Legislature, and met with the concurrence of all parties in the House. And a bill founded on both of these bills actually passed a second reading; but, at the last moment, for some unexplained reason, the Attorney-General suffered it to drop.

It is quite clear that the present mode of devolution of real estates on the death of the owner is not satisfactory; more especially as regards the claims of creditors. As between the claims of heirs and devisees on the one hand, and those of creditors of the deceased owner on the other, we think there can be no difference of opinion as to the right of the latter to payment of their debts out of the assets of their deceased debtor, whether real or personal, being entitled to paramount consideration. As the law at present stands, however, it places the devisee or heir of the deceased debtor in the same position as the debtor. If they can effect a *bona fide* sale of the lands descended, or devised, it will hold against creditors and the latter are left to their personal remedy against the heir or devisee for the amount of assets so received by them, which may prove in many cases worthless.

In the case of *Spackman v. Timbrell*, 8 Sim. 253, a debtor devised his estate to his son in fee. After the testator's death the son settled the devised estates on his marriage on his wife and children; the son was a bankrupt, and the result was the creditors lost all claim on the land, and the personal remedy against the devisee was of course worthless. This case was decided as long ago as 1836. To the same effect are *Kinderley v. Jarvis*, 22 Beav. 1, and *Reid v. Miller*, 24 U. C. Q. B. 610. No one can reasonably pretend that this is a satisfactory condition of the law. The reason frauds of this kind (if such a term can properly be applied to a proceeding which is sanctioned and protected by the law) are not more frequently

CHOSSES IN ACTION.

perpetrated than they are, is due, we believe, to the fact that people for the most part assume that the law really is what their common sense notion of justice tells them it should be.

The *English Law Times* fears that a law framed on the lines of the bill in question would give rise to much litigation. This is, however, merely saying in other words what has been often before recognized as a truism, "it is far easier to conceive justly what would be useful law, than so to construct that same law that it may accomplish the design of the lawgiver." The principle of the proposed law is, we conceive, incontestably sound. We do not deny, however, there are difficulties in the way of framing it so that it may adequately carry out the end in view. In Newfoundland for fifty years past all real estate has been made chattels real by legislative enactment, and is administered in the same way as personal estate. The distinction between real and personal property so far as its devolution on death is concerned has been practically swept away, and no inconvenience has been found to result. Lawyers who were opposed to the change of the law (notably ex-Chief Justice Hoyles) have by practical experience of its working for many years been brought to the conclusion that it is a real and substantial improvement in the law, and devoid of any evil effects.

CHOSSES IN ACTION.

To give a correct definition of the meaning of a word or phrase, and especially any word or phrase used for the expression of ideas concerning the law, is proverbially difficult. All lawyers are familiar with the words "choses in action," but it seems they are not by any means agreed as to what is a correct definition of that expression. Mr. Kehoe, in his little work on "Choses in Action," has selected from

standard authors three definitions which are given in the introductory chapter, all of which differ from each other. The first is taken from Blackstone, who considers that a "choses in action" is property in action dependent upon contract express or implied. His definition is to this effect: "Property in action is such where the man hath not the occupation, but merely the bare right to occupy the thing in question, the possession whereof, may, however, be recovered by a suit or action at law, from whence the thing so recoverable is called a thing or 'choses in action,' " . . . "all property in action depends entirely upon contract either express or implied, which are the only regular means of acquiring a 'choses in action.'" The second is from the "Termes de la Ley," in which it is said "a choses in action" is where a man hath cause, or may bring an action for some duty due to him as upon an obligation for breach of covenant, for trespass, or the like; and indeed, wherever a thing is not in possession, but when for recovery of it, a man is driven to his action (and consequently enjoys a right merely) such thing is called a "choses in action."

From Abbott's Law Dictionary the third definition of the term is taken, and is as follows: "'A choses in action' is any right to debt or damages, whether arising from the commission of a tort, the omission of a duty or the breach of a contract. A 'choses in action' includes all rights to personal property not in possession, which may be enforced by action, demands arising out of torts, as well as contracts. 'Choses in action' is a phrase which is sometimes used to signify a right of bringing an action, and at others, the thing itself, which forms the subject matter of the right, or with regard to which that right is exercised; but it more properly includes the idea both of the thing itself and of the right of action annexed to it.

CHOSSES IN ACTION.

Thus, when it is said that a debt is a 'chose in action,' the phrase conveys the idea, not only of the thing itself, *i.e.*, the debt, but also of the right of action, or of recovery, possessed by the person to whom the debt is due."

We think it doubtful whether any of these definitions can be considered correct or satisfactory. Much of the difficulty in arriving at a proper idea of the true legal signification of the term is due, no doubt, to the fact that the expression "chose in action," is an attempt to express an abstract idea, something in *posse* and not in *esse*, by an expression applicable only to that which is essentially concrete. "A thing in action:" the word "thing," in its ordinary signification, implies something of a tangible and corporeal nature; whereas what is intended to be expressed by the words "chose in action" is something of an intangible and incorporeal character.

One of the commonest illustrations of a "chose in action" is a promissory note. But the piece of paper on which the note is written, together with the characters with which it is written, do not constitute the "chose in action;" the "chose in action" is that intangible and impalpable thing which the paper and writing are merely the evidence of the existence of, *viz.*: the promise to pay, and the money to be received in fulfilment of the promise; hence it was that at common law a promissory note was not the subject of larceny; hence too, if a note is lost or destroyed the "chose in action" of which it was the evidence, is not gone, and it may be recovered by action notwithstanding the loss or destruction of the paper.

The use of the word "thing" as applied to such rights, is, to say the least, confusing, and we may agree with the late John Austin: "that if it were expelled from the language of the law much confusion would be avoided."

Difficulty is also created by the manner in which some text-writers place a "chose in action," in opposition to a thing in possession. For instance, "property in action" is described as being "where a man has not the enjoyment (actual or constructive) of the thing in question, but merely a right to recover it by suit or action at law, whence the thing so recoverable is called a thing or "chose in action." Stephen's Coms., vol. 2.

Now, suppose A wrongfully take B's horse, according to this definition the horse so long as it wrongfully remained in A's possession would be a "chose in action" of B. But the writer who uses this expression, himself declares a little further on that "a 'chose in action' is a thing rather in *potentia* than in *esse*," and there is no doubt we think that the latter is the true idea of a "chose in action," and one which would therefore prevent the application of the term to any specific thing *in esse*.

Abbott's definition, as we have seen, comprehends under the head of "choses in action" all rights to personal property not in possession which may be enforced by action. This appears obviously too broad, and would include the right to recover personal property by proceedings *in rem*. That there is an obvious distinction between chattels out of the possession of the owner, and "choses in action," may be well illustrated by a reference to the law which formerly governed the right of husbands in the personal property of their wives. As regards her chattels he was entitled to them whether reduced into possession or not during the coverture, but as regards her "choses in action" he was not entitled to them unless reduced into possession during the coverture, and yet, according to Abbott's definition, the wife's chattels not in the possession of the husband would be "choses in action." Personal property recoverable by proceed-

CHOSSES IN ACTION—LORD CAIRNS.

ing *in rem* is therefore to be excluded from the definition of a "chose in action."

While in some respects Abbott's definition seems more correct than Blackstone's in that it does not confine the term to those rights of action which spring from contract, it is yet apparently defective in seeking to extend the term generally to all rights to personal property not in possession in respect of which a right of action may exist.

One of the most satisfactory definitions we have met with is that given in Sweet's Law Dictionary, viz.: "'A chose in action' is a right of proceeding in a court of law to procure the payment of a sum of money, e.g., a bill of exchange, a policy of insurance, an annuity or a debt, or to recover pecuniary damages for the infliction of a wrong, or the non-performance of a contract," but even this does not include all those rights which in law are termed "choses in action," for instance, the right of presentation to which a patron dies entitled if there be a vacancy at the time of his death, is considered in law a "chose in action (Co. Lit. 90 b.). Sweet's definition, it will be observed, although it excludes property recoverable by action *in rem*, does not include such rights as those last mentioned. He confines the definition to pecuniary demands, whereas we are inclined to think it is properly applicable to all personal rights recoverable or enforceable by proceedings *in personam*.

If A's horse be wrongfully taken the horse does not thereby become a "chose in action" of A, notwithstanding A may be put to his action of detinue or replevin to recover it; but A's right to recover damages for the wrongful taking or detention would be a "chose in action," the actions of replevin and detinue being actions *in rem*, while the action for damages is an action *in personam*.

If we are correct in what we have said above then we think the following would be a tolerably correct definition :

A "chose in action" is any personal right or demand which may be enforced or recovered by an action *in personam*; it includes not only the right of action but also the right or demand to be enforced or recovered; at the same time the right or demand when enforced or recovered *ipso facto* ceases to be a "chose in action." When such right or demand was formerly enforceable or recoverable in a court of law it is a legal "chose in action," when it could formerly only be enforced or recovered in a Court of Equity it is an equitable "chose in action."

Possibly some of our learned readers may think we too have failed in giving a satisfactory definition of this puzzling phrase.

SELECTIONS.

THE LATE LORD CAIRNS.

On January 26, 1844, Mr. Cairns was called to the English Bar at the Middle Temple, and he rapidly acquired an extensive practice in the Courts of Equity. In 1852 Mr. Cairns contested Belfast; he was returned for that borough, and continued to represent it in the Conservative interest until his elevation to the judicial bench. In 1856 Mr. Cairns was appointed one of Her Majesty's counsel and a bencher of Lincoln's Inn. Lord Derby being called to form an Administration in February, 1856, Mr. Cairns was offered the appointment of Solicitor-General which he accepted, under Sir Fitzroy Kelly as Attorney-General, being knighted on the occasion. In the following session the new law officer gave an earnest of his intentions as a law reformer. He introduced two measures, one of which was designed to simplify titles, and the other to establish a registry of landed estates. His lucid exposition of these measures very favourably impressed the House; but unfortunately a Ministerial crisis and the abrupt conclusion of the session pre-

LORD CAIRNS.

vented the bills from being carried. In June, 1859, Sir Hugh Cairns resigned office with the Conservative Ministry. In February, 1868, Lord Derby relinquished the Premiership in consequence of failing health. Mr. Disraeli now became the head of the administration, and among other changes which took place in the Ministry Lord Cairns became Lord Chancellor in the room of Lord Chelmsford, and was succeeded as Lord Justice by Sir W. Page Wood, afterwards Lord Hatherley. He went out of office with his party in December of the same year, and became leader of the Opposition in the House of Lords. In 1869 he resigned that position, but on the opening of the session of 1870 he consented to resume it. Mr. Gladstone having retired from office in February, 1874, Mr. Disraeli was summoned by the Queen to form a new Administration, and Lord Cairns again became Lord Chancellor. He continued to hold that office until April, 1880, when Lord Beaconsfield went out of office. Although his health has prevented him taking that part either in the judicial or legislative functions of the House to which his position entitled him, Lord Cairns, down to the time of his death, has made occasional appearances in the House of Lords. He was attached to the Evangelical principles of the Church of England, but was ready to co-operate on all occasions with other workers in the religious field. He appeared on many platforms in the metropolis as an advocate of measures, social and religious, for the amelioration of the masses. In Dr. Barnardo's Homes for Destitute Children, at Stepney and Ilford, he took a special interest. When the management of these homes was subjected to a good deal of criticism, and when a board of arbitration had decided that unjust accusations had been brought against the director, Lord Cairns came forward and expressed his readiness to assume the office of president of a committee formed to assist Dr. Barnardo in the further development of his work. The coffee-house movement, also, and many other such movements and organisations, Lord Cairns encouraged not only by his name, but by his personal labours and influence. He was a supporter of several of the local institutions of Bournemouth,

and notably the Young Men's Christian Association.

The place which history will assign to Lord Cairns will probably be that of the greatest lawyer on the English Bench of his generation. The late Mr. Benjamin, whose capacity for passing a judgment and impartiality in the matter will not be questioned, pronounced Lord Cairns the greatest lawyer before whom he had ever argued a case, and Lord Bramwell is known to have a very high estimate of his powers. The attribute in which Lord Cairns excelled was lucidity. The most complex legal problem presented no difficulty to him, and it passed out of his hands placed by his mere statement in so simple and clear a light that the wonder was why there could ever have been any difficulty about it. Readers of his judgments are like those who look for the first time on a simple mechanical contrivance producing great results:—

The invention all admire, and each, how he
To be the inventor missed; so easy it seemed
Once found, which yet unfound most would have
Impossible. [thought]

Lord Cairns made no display of a depth of reading like that of a Willes or a Blackburn, although he was far from deficient in learning. Case-law a man of his powers could afford to despise, and even when at the Bar he was in the habit of citing no cases until he had exhausted the principles of the argument, when he would mention the names of the authorities illustrating his proposition. Much of the logical precision which distinguished him in the statement of legal propositions was due to the fact that, in the chambers of the late Mr. Thomas Chitty, at 1 King's Bench Walk, he was well grounded in the practice of common law pleading, a training of which students at the present day are unfortunately deprived. Lord Cairns on the Bench was not, like the late Sir George Jessel, fond of bringing his own individuality to the front, or of exposing in his judgments the processes by which he arrived at them. In delivering judgment, he was like an embodiment of the voice of the law, cold and impersonal, and suggested an intellectual machine upon which no sophism could make any impression, and which stamped the seal of the law upon what was obviously reason-

LORD CAIRNS—DYNAMITE WARFARE.

able and just. Perhaps Lord Westbury was his equal in penetration and in clearness of expression; but either from his matter or his manner he did not carry the same inexorable conviction. An example of the high estimate he had of the dignity of judicial proceedings was supplied at the time of the addition of the lords of appeal to the House of Lords. One of the new lords of appeal had acquired in a Court, in which speed was considered rather than orderliness, the habit of interrupting the arguments by questions in the nature of "posers." On his reverting to this habit in the House of Lords, Lord Cairns interposed from the woolsack before the question could be answered, with the words: "I think the House is desirous of hearing the argument of counsel and not of putting questions to him."

In the House of Lords, on Monday, the 13th April, Lord Granville, after advertising feelingly to the blow inflicted by the death of Lord Cairns, said: "I hold in my hand a letter from the Lord Chancellor (Selborne) which, after a touching allusion to the great calamity which he himself has sustained, goes on thus: 'I should like you to say that I am among those who feel this loss deeply, both upon public and private grounds, and if I were not myself suffering under the severest affliction, I should desire, from my place in the House to endeavour to pay that tribute to the late earl's great qualities and great virtue, for which nearly forty years of constant intercourse on terms of friendship never interrupted might perhaps have qualified me.' I feel that these are words which all your lordships will indorse, and it seems to me that in these sad circumstances it is singularly pathetic and strikingly indicative of the character of the two men—this simple tribute from Lord Selborne to his friend and rival who has passed away."

Lord Salisbury, after referring to the acuteness of the bereavement of the Conservative party and the greatness of Lord Cairns as a lawyer, statesman and legislator, said: "No one but those who have sat in council and worked with him can thoroughly appreciate the inestimable value of his calm, judicial mind, even on the most burning questions, and the

wonderful grasp with which he perceived at once all the bearings of the most complicated facts and the lucidity with which he marshalled the arguments and elucidations to which it was necessary to give attention, and which fell from his mouth, as it seemed, at once naturally and without effort into their proper place.

Lord Coleridge also testified to the public loss sustained, and added that Lord Cairns had a mind powerful enough to throw light and order into the most intricate and complicated facts, while he could unweave the subtlest web of argument; and yet he never wasted time or words, but grasped more firmly than most men the subjects with which he had to deal. He could make them more intelligible and clear than others, and at times he rose to an eloquence severe, but always elevated and striking.—*Law Journal*.

INTERNATIONAL RESPONSIBILITY FOR DYNAMITE WARFARE.

The American people, with few exceptions, sympathize profoundly with Mr. Parnell and his followers in their effort to secure for Ireland that legislative independence and local self-government which have been fruitful of so many blessings to us. But with scarcely an exception, they look with equal abhorrence upon the attempt of another section of Irish agitators to achieve the same end by resorting to what are termed "the resources of civilization." The recent dynamite explosions in the Lobby of the English House of Commons and in the Tower of London, followed by an attempt on the part of an English woman in the city of New York to assassinate a man who is supposed to be one of the principal leaders in this new species of warfare, call up sharply the question whether we are not neglecting the duty which we owe to Great Britain as a friendly nation, in permitting these plots to be concocted and these expeditions to be fitted out upon our shores. We assume what we suppose no well informed American doubts, that these assaults upon public buildings and upon public persons are concocted outside of England, and that the principal nests of

DYNAMITE WARFARE.

conspirators who concoct them are to be found within the limits of the United States, where they burrow like serpents, and direct in secret their hostile expeditions against the government and people of England, including defenceless women and children. We assume also, that the act of one or more men in attempting to destroy public buildings, or to kill public officials, for the purpose of changing the political condition or conduct of a nation, is an act of private war against that nation, and that it is none the less an act of war because large numbers are not openly engaged in it, or because armies are not in motion under insurrectionary standards. If, then, one of these secret dynamite expeditions is fitted out within this country, and departs hence to England to do its fiendish work there, it is substantially the same in principle as though a military expedition had been fitted out in this country, and had sailed for the purpose of making an attack upon the military and naval forces of Great Britain. Now, we understand it to be a principle of international law that one friendly nation owes a duty to every other friendly nation—not, indeed, that of an insurer against the fitting out and departure of warlike expeditions against such friendly nation—not an obligation to prevent such a result absolutely and at all events, but a duty to use reasonable diligence to that end. It was upon this ground that the Geneva Arbitration awarded damages to this country as against England, for allowing the Confederate cruiser, the *Alabama*, to escape from one of her ports for the purpose of preying upon our commerce. The question which the recent occurrence of these dynamite outrages presses upon us at the present time is, Have we performed our duty to England in this regard? It is difficult to say that we have. Funds have been publicly collected in this country for years, by O'Donovan Rossa and his gang, for the avowed purpose of attacking England by secret expeditions of this kind. It is idle to say that we perform our duty to a friendly nation when, having every reason to believe that such expeditions are furnished and fitted out in this country, we take no measures to discover and arrest them. It is no answer to England that our laws do not enable our officials to arrest and punish such

conspirators. What concern has England with the state of our municipal law? When we allege the defects of our laws as a reason for not performing our duty to a friendly power, that power is entitled to make answer in the thunder of cannon. With shameful negligence, in 1867, we allowed a military expedition to organize in the northern part of the State of New York, with the greatest publicity, for the purpose of invading Canada. It did invade Canada. A battle was fought with it on Canadian soil, in which a number of Canadians were killed. A monument stands in the city of Toronto with their names inscribed upon it. It will stand for ages as a monument of American bad faith and shame. Some things, it is true, were to be said in our favour then. The *Alabama* claims were unsettled. The St. Albans raid was fresh in our memories. But our duty was plain and unmistakable. The St. Albans raid was a secret affair, for which the Canadian government was not responsible. The Canadian people had no more to do with the escape of the *Alabama* than the people of Australia or Cape Town had. They were neighbours, Christians and honest people, who had not offended us, and we owed them, on common principles of honesty and humanity, the duty of seeing that a body of men were not permitted to organize on our side of the River St. Lawrence for the purpose of crossing over and killing them. Plainly, we have not discharged our duty in regard to this dynamite business, and unless we wake up to a sense of that duty, we shall forfeit the right to a decent position in the family of civilized nations.—*Central Law Journal*.

REPORTS.

CANADA.

CHANCERY DIVISION.

(Reported for the LAW JOURNAL.)

SNIDER V. SNIDER.

SNIDER V. ORR.

Irregularity—Statement of defence—Filing defence after cause set down for hearing in default of defence.

Where a defence was filed after the action had been set down to be heard on motion for judgment in default of defence,

Held, the defence was irregularly filed, and that it should not be allowed to remain on the files, except upon the terms of payment of all costs occasioned to the plaintiff by the defence not having been filed in due time.

[Boyd, C.—June 11, 1885.]

E. D. Armour, for plaintiff, moved for judgment in default of defence in both of the above actions.

C. J. Holman, for defendant. A statement of defence has been filed in each action since they were set down, and therefore the plaintiff cannot now obtain judgment as for default of defence.

Gill v. Woodfin, 25 Ch. D. 707.

E. D. Armour, in reply. The defences are filed too late and therefore are irregular, *Clarke v. McEwing*, 9 P. R. 281; if allowed to stand, the defendant should be ordered to pay all costs occasioned by his default.

Boyd, C.—The defence, being filed after the time limited, is irregular. If the defendant, within ten days, pays to the plaintiff all costs occasioned by the setting down of the action to be heard on motion for judgment in default of defence, the statement of defence may be allowed to remain on the files. If these costs are not paid within the time I have named the defences must be struck out, and judgment must go in each case in accordance with the prayer of the statement of claim.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

Boyd, C.]

[April 22.]

KITCHEN V. DOLAN.

Purchase of land—Evidence of agency—Statute of Frauds.

D. agreed to purchase certain lands as agent for K., and accordingly executed an agreement for the purchase of the same in her own name.

Held, that the evidence of D.'s agency was receivable though not evidenced by writing.

Quære, whether *Bartlett v. Pickersgill*, 1 Cox 15, is still to be regarded as good law?

W. Cassels, Q.C., and *Matheson*, for the plaintiff.

Martin, Q.C., and *Livingstone*, for the defendant.

Full Court.]

[May 21.]

COOK V. EDWARDS.

Farm lease—Covenants—Right to increase the arable land.

A lease of a farm contained the covenant that the lessee "shall and will, at his own costs and charges repair and keep repaired the erections and buildings, fences and gates erected or to be erected on the premises, the said lessee finding or allowing on the said premises all rough timber for the same, or allowing the said lessee to cut and fell so many timber trees upon the premises as shall be requisite."

Held, that the above words must be read as if "hereby" was inserted before "allowing." It was intended to intimate by that clause that the lease permitted the use as occasion arose of the timber for such purposes. There was nothing in it to indicate that the landlord was to control the use of the timber so that he might limit it to the buildings, fences and erections existing at the date of the lease.

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Held, further, that the proper construction of the lease in question implied that the lessee was at liberty to bring further parts of the demised premises into cultivation without the landlord's assent, and to fence the same without his assent. That is to say, if it was a reasonable and proper thing to do in the course of good and judicious husbandry so to enlarge the arable area of the farm, the right to do this existed without the lessor's assent.

Judgment below affirmed with costs.

J. K. Kerr, Q.C., for the plaintiff.

Falconbridge, for the defendant.

Full Court.]

[May 21.]

GRAHAM V. WILLIAMS.

Mechanics' lien—Right of lien-holder against tenant to charge the land of the landlord—R.S.O., c. 120.

Judgment of *Boyd, C.*, noted *supra* p. 36, affirmed.

It requires something more than mere knowledge of the work being done to bind the owner under R. S. O. c. 120. The priority and assent must be in pursuance of an agreement, for otherwise a reversioner after a long lease might be held bound by the contracts of the tenants if he saw and did not disapprove of the buildings being erected by the tenants.

R. S. O. c. 120, gives priority to the lien-holder to the extent of the increased value over a mortgage existing or created before the commencement of the work, but not over subsequent mortgages, so as to create a lien against the interest of a subsequent mortgagee.

J. Maclellan, Q.C., for the appeal.

J. J. Gormully, contra.

Full Court.]

[May 21.]

MAGEE V. KANE.

Contract of sale—Statute of Frauds—Possession as evidence of part performance.

When a person came into possession of property as tenant, and it was shown by unequivocal facts that his tenancy was afterwards relinquished, and that his possession being changed by parol contract to purchase, was continued as that of vendee.

Held, that the possession thus changed was such part performance as took the contract out of the Statute of Frauds.

The new fact showing the change in the character of the possession in this case was part payment of the purchase money evidenced by the receipt in terms thereof; and the possession continuing under the newly created relationship between the parties was held to be an act of part performance affecting the land, solely referable to the contract to purchase, operating by and against both, and to enforce which either one could be the actor.

Judgment below affirmed with costs.

W. Cassels, Q.C., for defendant.

J. J. Gormully, for plaintiff.

Boyd, C.]

[May 23.]

COLEMAN V. KING.

Deed—Mortgage—Construction according to true intent—Family arrangement—Inconsistency.

When W. H. conveyed his farm to his son, and took back from him a mortgage on it, which contained a proviso for redemption on payment of \$4,000, in manner following: to pay W. H. and A. H., his wife, during their joint lives \$300 a year, and to continue to make the said payments to the survivor after the death of either during the life of the said survivor; and one year after the death of both to pay his brothers and sisters \$300 each at the times therein mentioned, which words were inserted in writing, the rest of the instrument being printed.

Held, that it being impossible to give literal effect to all the parts of the mortgage, the defeazance clause upon payment of \$4,000 without interest being quite irreconcilable with the particulars regarding the payments, the Court must regard the general intent of the deed, and give it such construction as supported that general intent. The primary intention evidently was to arrange the terms of an annuity for the joint lives of the father or mother and of the survivor. But the \$4,000 would be consumed at the end of thirteen years, and the instrument could not be construed as embodying such an improvident arrangement as that no further maintenance

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was to be given in case either parent lived for, say fifteen years afterwards. On the other hand, if W. H. and A. H. died in a short time the defendant would have the farm for small value. The conclusion seemed irresistible that the defendant was willing to take his chances in this transaction, thereby gaining a good farm at small cost if death soon lightened his financial burden, and at any rate gaining it on reasonable terms (as the evidence of its value showed) even if the lives of his parents were prolonged. Such seemed the general scope and intent of the instrument, and as such it must be construed, and the son therefore could not succeed in his present contention that he was not in any event to pay more than \$4,000.

D. Armour, for the plaintiff.

C. Moss, Q.C., for R. Hill.

Boyd, C.]

[May 26.]

EXCHANGE BANK V. STINSON.

Winding up proceedings—Payment of cheques on deposit accounts after suspension of bank—45 Vict. c. 23.

The bank suspended payment September 15th, 1883. Winding up proceedings were commenced November 23rd, and an order made December 5th. R. and G. H. purchased a stock of hardware held by the bank, on which they owed \$14,000 at the time of the suspension. The bank wishing to close the account sold the balance of the stock to A. H. & Co. for \$5,700, and agreed to accept in payment cheques of the defendant drawn on his deposit account, and which were drawn on and accepted by the bank on October 31st. For these cheques A. H. & Co. gave their acceptances, which were duly paid. Before the stock was delivered R. and G. H. settled the balance of their debt.

In an action by the liquidators of the bank against the defendant to recover back the amount thus paid on the defendant's cheques under 45 Vict. c. 23, it was

Held, that the plaintiff could not recover.

The defendant also owed A. H. & Co. a debt, and gave his cheque on the bank for \$92 in part payment thereof, which the bank accepted

from A. H. & Co. on October 23rd in retiring an overdue bill.

Held, that that amount could not be recovered back. On November 19th defendant sold his cheque for \$320 to his uncle C., who was the local head of the bank, which cheque was negotiated and accepted by the bank on November 23rd (after winding up proceedings had commenced).

Held, that although it probably was an invalid transaction, as far as the person who received the money was concerned, there was no payment to the defendant of anything within the scope and meaning of the 75th sec. of the Act.

MacLennan, Q.C., and *Bain*, Q.C., for the plaintiffs.

E. Martin, Q.C., for the defendant.

Boyd, C.]

[May 26.]

PELLS V. BOSWELL ET AL.

Corporation by-law passed in private interest—Injunction.

Corporations are trustees of their powers for the general public, and when they prostitute them for the benefit of an individual at the cost of another, the general public not being interested, their action will be restrained by the Courts.

P. was the owner of a small piece of land at the south side of Johnson's lane, which had been reserved when the lane was laid out. Johnson's lane extended half way between Adelaide and King Streets, in the city of Toronto, and M. and T. were the owners of the property extending from Johnson's lane to King Street, and were desirous of obtaining access to Adelaide Street through the lane and over P.'s reserved part, and tried to purchase it but failed.

A by-law to open up Johnson Street, initiated by the petition of M., T. and others, reciting that "they were desirous of securing communication between King and Adelaide Streets for vehicles, by means of the above street and certain lanes to the south thereof," but only providing for the opening up to M. and T.'s properties was passed by the City Council and about to be sealed, when P. brought his action

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[Chan. Div.]

to restrain the Council from further proceeding with the same. It was

Held, that P. was entitled to succeed, and the injunction was granted with costs.

H. D. Gamble, for plaintiff.

Foster and McWilliams, for the defendants.

Boyd, C.]

[May 26.]

EXCHANGE BANK V. COUNSELL ET AL.

Winding up proceeding—Payment to creditors—
45 Vict. c. 23, s. 75.

The bank suspended payment September 15, 1883. Winding up proceedings were commenced November 23, and an order made December 5. The defendants, C. and S., being depositors in the bank, drew a cheque for \$4,000 on November 1 on their deposit account, which was given to D., a debtor of the bank on notes maturing the following December and January. D. gave mortgage security for the cheque on October 31. The arrangement was all made about October 5, although the security was not given until the 31st, and the cheque was not presented to the bank until November 23, when it was accepted as payment of the maturing notes.

In an action by the liquidators of the bank against the defendants, to which D. was not a party, to recover the amount thus paid on the cheques as having been paid after the winding up proceedings were commenced. It was

Held, that the defendants could not be proceeded against to make them account for the \$4,000 upon a statement of claim alleging that there was an illegal payment of that sum upon their cheque in the circumstances above stated. Upon the facts there was no payment by the bank to the defendants.

C., who was being sued by the bank, obtained defendants' cheque for \$2,118, giving security therefor on November 21, and retired the notes in suit on November 23.

Held, that the defendants could not be ordered to repay the amount of the cheque as being a wrongful payment under 45 Vict. c. 23, s. 75.

MacLennan, Q.C., and *Bain, Q.C.*, for the plaintiffs.

E. Martin, Q.C., for the defendants.

Boyd, C.]

[June 10.]

WILLIAMS V. ROY.

Remuneration to executors.

A testator willed as follows: "I hereby authorize and direct my said executors to retain for their own use and benefit the sum of \$200 each in lieu of all charges, for their services in performing the duties hereby imposed on them as executors of this my will."

An action having been instituted for construction of the will and administration, the executors, who had retained the said sum of \$200, claimed the further sum of \$580 as compensation for their services.

It was admitted by all parties that it would be proper for the executors to retain the said further sum if not prevented by the express clause in the will.

Held, that the executors could not have more than the sum fixed by the testator.

In 1874 the Legislature, by the 37 Vict. c. 9, laid down the principle that the Court is not to fix the allowance to trustees when the testator has himself provided what it shall be. This is a most reasonable rule, not requiring a parliamentary declaration as to its propriety.

Lash, Q.C., for the Girls' Home.

Hoyles, for the executors.

H. Murray, for the Orphans' Home.

Lefroy, for the Boys' Home.

Boyd, C.]

[June 11.]

BARCLAY V. ZAVITZ.

Will—Devise of mortgage—Maintenance of wife—Principal and interest.

G. H. Z. in his will provided as follows: "With respect to a certain mortgage . . . my will is as follows,—I give and bequeath out of the proceeds of said mortgage to each of my daughters (naming them) the sum of \$200, to be paid them respectively when the youngest of my said children reaches the age of twenty-one years, and if any of my said children shall not have been married before that time the child or children being then unmarried shall not receive their shares until such times as she or they shall marry.

Provided that my executors may pay such part or parts of said legacies . . . if they

[Prac.]

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[Prac.]

can do so without interfering with the proper support of my wife and family. Provided if any of my daughters die without issue the legacy . . . shall be divided among their surviving sisters.

The balance of the proceeds of said mortgage I give and bequeath to my said wife to have and to hold the same for her use and benefit, and for the use and benefit of the unmarried members of my family during the natural life of my said wife, after which my will is that the balance of proceeds of said mortgage still remaining be equally divided among my daughters then surviving.

Held, that the widow held in trust during her life for herself and her unmarried daughter, and that she was bound during her life to apply the proceeds of the mortgage for the proper support of herself and that daughter while unmarried; treating the principal and interest of the mortgage as a blended fund, and what remained was to be divided, and that the widow had the right to draw *bona fide* from the proceeds of the mortgage, even if it consumed the whole of the *corpus*.

A matter involving the proper construction of a will cannot be brought upon petition under R. S. O. c. 107, s. 35.

Moss, Q.C., for plaintiffs.

J. Hoskin, Q.C., for infant.

PRACTICE.

Q. B. Div. Ct.]

[May 27.]

MOXLEY v. CANADA ATLANTIC RAILWAY COMPANY.

Affidavit of documents—Motion for better affidavit.

The decision of ROSE, J. (*ante*, p. 12), was reversed on appeal.

The rule laid down in *Jones v. The Monte Video Gas Co.*, 5 Q. B. D. 556, may be accepted as the general rule on the subject of production of documents, but it should be read in conjunction with *The Attorney-General v. Emerson*, 10 Q. B. D. 191.

The affidavit of documents filed in this case stated that the defendants objected to the production of the documents in question be-

cause "they are in constant use in the business of the defendants, and are necessary for that purpose."

Held, that the affidavit was wholly insufficient, and that the books must be produced.

W. H. P. Clement, for the appeal.

Lefroy, contra.

C. P. Division.]

[May 30.]

MAJONEY v. MACDONELL ET AL.

Trial—Evidence—Exclusion of witnesses.

At the beginning of the trial of the action all witnesses were ordered out of Court, but the parties to the action were not requested to retire. Judgment having been given dismissing the action against the defendant P., his co-defendant M. entered upon his case and called P. as a witness. P. had remained in Court and heard the whole of the evidence adduced by the plaintiff.

Held, that the evidence of P. was improperly rejected, and a new trial was ordered with costs to be costs in the cause to the defendant.

Aylesworth, for the defendants.

Cattanach, for the plaintiff.

Rose, J.]

[June 1.]

WOODRUFF v. McLENNAN.

Judgment under Rule 80, O. J. A.—Delivery of statement of claim.

Held, that the practice of moving under Rule 80 O. J. A., for leave to enter final judgment after delivery of a statement of claim is not one to be encouraged, although in some cases it may be allowable.

Under the circumstances of this case such a motion was refused.

Masten, for the plaintiff.

Holman, for the defendant.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Boyd, C.]

[June 8.]

THE BANK OF B. N. A. v. THE WESTERN
ASSURANCE COMPANY.

*Powers of local taxing-officers—Administration of
Justice Act, 1885.*

The Administration of Justice Act, 1885, (48 Vict. ch. 13, s. 22, O.) has not conferred upon local registrars of the High Court the power of taxing counsel fees to any greater amount than they are allowed to tax under the the tariff of the 10th September, 1881.

In this case an appeal from the taxation of the local registrar at Brantford was allowed, and the items in dispute were referred to one of the taxing officers at Toronto.

G. Tate Blackstock, for the appeal.

Holman, contra.

Boyd, C.]

[June 8.]

RE HARNDEN, HANDEN v. HARNDEN.

*Bringing in accounts—Motion to commit—
G. O. Chy. 201 and 296.*

G. O. Chy. 201 and 296 are still in force in the Chancery Division.

Upon a motion to commit the defendant (an administrator) for neglecting to bring in his accounts by a day named pursuant to the direction of the Master,

Held, that personal service upon the defendant of the Master's direction and of the notice of motion to commit was not necessary.

Watson, for the motion.

Shepley, contra.

Boyd, C.]

[June 10.]

COLE v. CANADA FIRE INSURANCE CO.

*Setting cause down for June—Certificate of counsel
—G. O. Chy. 420.*

The certificate of counsel necessary under G. O. Chy. 420, in order to set down a cause for argument in the Chancery Division during the month of June, may be given by counsel for a party other than the party setting the cause down.

Holman, for the plaintiff.

Bain, Q.C., for the defendants.

Boyd, C.]

[June 11.]

SNIDER v. SNIDER.

Delivery of statement of defence.

A statement of defence in an alimony action was delivered after the proper time and on the same day on which the plaintiff set the action down to be heard on motion for judgment.

Held, that the defence was irregular, and it was ordered that it be struck out and judgment granted as prayed by the statement of claim, unless the defendant paid the costs of setting down the action and of the motion for judgment within a limited time.

E. Douglas Armour, for the plaintiff.

Holman, for the defendant.

Boyd, C.]

[June 11.]

DARLING v. THE MIDLAND RAILWAY CO.

*Ontario and Dominion Railway Acts—Procedure
—Appeal from award.*

Certain land was expropriated by defendants in 1876, and proceedings to obtain compensation therefor were begun in August, 1884. On the 25th May, 1883, the defendants' railway became by statute a Canadian road, and subject to the legislative authority of Canada, having previous to that date been an Ontario road.

Held, that the procedure provided by the Dominion Consolidated Railway Act, 1879, applied, and that an appeal from an award could therefore not be prosecuted under the Ontario Railway Act.

Lash, Q.C., for the defendants.

G. Tate Blackstock, for the plaintiff.

BOOK REVIEWS—ARTICLES OF INTEREST.

BOOK REVIEWS.

LEADING CASES IN CONSTITUTIONAL LAW, briefly stated, with Introduction and Notes, by Ernest C. Thomas, Esq., late Scholar of Trinity College, Oxford, and Bacon Scholar of the Hon. Society of Gray's Inn. 2nd edition. London: Stevens and Haynes, 1885.

Constitutional Law will always be an important study to a people watchful of their political rights, for within its definitions may be found the limits of the public authority of the three great departments of government—legislative, executive and judicial. In the British Constitution, according to Blackstone, "absolute despotic power, which in all governments must reside somewhere," is centred in Parliament, yet that body has ever regarded as supreme and unrepealable those constitutional enactments of its early predecessors which declare themselves to be "the law of this realm forever," or which eloquence affirms are "enshrined in the sacred ark of the constitution." And yet, the sovereign, in whose name as the sole legislator that supreme despotic power enacts its laws, is in all the qualities of sovereignty subject to the law, as was deftly and boldly stated by Lord Coke to James I.:—Thus wrote Bracton; *Rex non debet esse sub homine, sed sub Deo et Lege*; and as Coleridge, J., declared in *Howard v. Gossett*, 10 Q. B. 386: "The law is supreme over the House of Commons and over the Crown itself."

But neither in jurisprudence nor text-books does English Constitutional Law take the same high stand that American Constitutional Law takes, or which Canadian Constitutional Law is rapidly taking. Very little philosophic or scientific law is to be found in the judgments of English judges. They deal with the case in hand and the dry statute or common law applicable to it. Rarely, except in Colonial or Indian appeals, do we meet with judgments dealing with the questions of a general or limited grant of sovereignty or legislation, or reviewing the varied rules applicable to the interpretation of a constitution which gives a general power or enjoins a particular duty with "implied powers of legislation," which may be resorted to for the exercise of the one or the enforcement of the other.

The work before us gives little aid in such a study. Its title, "Leading Cases," is misleading. But as a useful digest of cases on Constitutional Law it will be of value to students, and its usefulness as such has been proved by the issue of a second edition. It could be made more valuable

if it contained further cases illustrating the jurisdiction of the Courts to review executive acts of the Crown, as in *The Parlement Belge*, 4 P. D. 129; *Attorney-General v. Manchester*, L. R. 3 Eq. 436; *Long v. Bishop of Capetown*, Moo. P. C. N. S. 411, as well as cases like *Reg. v. Burah*, 3 App. Cas. 889, and *Hodge v. Reg.*, 9 App. Cas. 117, which define colonial legislative powers.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

- Rights in percolating water.—*Law Journal*, February 21.
- Privilege of solicitor in relation to criminal issues.—*Ib.*, March 28.
- Liabilities of municipal corporations for damage to private property caused by public works.—*Central L. J.*, April 17.
- The present law of payment for goods.—*Ib.*
- Actions for services rendered without any mention of compensation having been made—*Quantum meruit*.—*Ib.*, April 24.
- Counter-claims in actions ex delicto.—*Irish Law Times*, March 7.
- Preferences in compositions with creditors.—*Ib.*, May 15.
- The effect of taking security upon a lien.—*Ib.*, May 22.
- The ratification by corporations of the unauthorized acts of their agents.—*Ib.*
- Jurisdiction of the Court of Chancery over wills.—*Albany L. J.*, March 21.
- Rules as to the privileges of witnesses.—*Ib.*, April 4, 25; May 2, 16.
- Attorney's liens upon the cause of action.—*Ib.*, April 18.
- Lost wills.—*Ib.*, May 9, 16.
- Liability of company on forged or fraudulent share certificate.—*Irish L. T.*, March 7.
- Breach of contract when goods are sold to be delivered by instalments.—*Ib.*
- Manslaughter through negligence.—*Ib.*, March 14.
- Passengers' luggage—Liability of carriers.—*Ib.*, March 21.
- Actions for bets.—*Ib.*
- Marriage settlements induced by fraudulent misrepresentations.—*Ib.*, March 28.
- Liability of joint guaranties.—*Ib.*, April 4.
- The maintenance of infants.—*Ib.*, April 25.
- Married woman's consent to breach of trust.—*Ib.*, May 2.
- Liability of solicitor for partner's misappropriation of securities.—*Ib.*, May 9.
- On the assignment of debts and other choses in action.—*Ib.*
- Validity of contracts in restraint of trade.—*American Law Register*, April, May.
- Indictment of corporations—Law and practice of, considered.—*Criminal Law Magazine*, May.

FALL ASSIZES—FLOTSAM AND JETSAM.

FALL ASSIZES.

HOME CIRCUIT.

MR. JUSTICE GALT.

Milton	Tuesday	Sept. 15
Brampton	Monday	Sept. 21
Toronto, Civil Court.	Monday	Sept. 28
Toronto, Crim. Ct..	Tuesday	Oct. 27

EASTERN CIRCUIT.

MR. JUSTICE ARMOUR.

Kingston	Tuesday	Oct. 27
Brockville	Tuesday	Nov. 3
Cornwall	Tuesday	Nov. 10
L'Orignal	Monday	Nov. 16

MR. JUSTICE ROSE.

Pembroke	Monday	Oct. 26
Perth	Monday	Nov. 2
Ottawa	Thursday	Nov. 5

WESTERN CIRCUIT.

MR. JUSTICE ARMOUR.

London	Tuesday	Sept. 15
St. Thomas	Wednesday	Sept. 23
Chatham	Tuesday	Sept. 29
Sandwich	Monday	Oct. 5
Sarnia	Thursday	Oct. 8
Goderich	Tuesday	Oct. 13
Walkerton	Tuesday	Oct. 20

NIAGARA CIRCUIT.

MR. JUSTICE ROSE.

Hamilton	Thursday	Sept. 10
Barrie	Monday	Sept. 21
Welland	Wednesday	Sept. 30
St. Catharines	Monday	Oct. 5
Orangeville	Monday	Oct. 12
Owen Sound	Monday	Oct. 19

MIDLAND CIRCUIT.

MR. JUSTICE O'CONNOR.

Napanee	Monday	Sept. 14
Pictou	Monday	Sept. 21
Whitby	Thursday	Sept. 24
Lindsay	Thursday	Oct. 1
Peterborough	Thursday	Oct. 8
Belleville	Thursday	Oct. 15
Cobourg	Thursday	Oct. 29

OXFORD CIRCUIT.

CHIEF JUSTICE CAMERON.

Guelph	Monday	Sept. 14
Stratford	Monday	Sept. 21
Woodstock	Monday	Sept. 28
Berlin	Monday	Oct. 5
Cayuga	Monday	Oct. 12
Simcoe	Monday	Oct. 19
Brantford	Monday	Oct. 26

FLOTSAM AND JETSAM.

AMALGAMATION OF THE PROFESSION.

The Smoking Concert given by the Law Cricket Club took place at the Freemasons' Tavern, on February 6, according to the announcement in our last issue, and was a great success. The feature of the evening was a paper read by a member, entitled, "A Bill for the Fusion of Barristers and Solicitors."

Whereas many persons have supported energetically the fusion of the two branches of the profession, And whereas these persons believe themselves to be incapable of error, and it is accordingly apprehended that they must be right. And whereas the object cannot be satisfactorily accomplished without some small assistance from Parliament :

Be it therefore enacted as follows :—

1. *Short title.*—This Act may be cited as the B. and S. Fusion Act, 1885.

2. *Interpretation of word.*—In this Act the word "fusee" shall mean a person fused under this Act, and shall not include the odoriferous article or thing used for igniting tobacco, unless the context imperatively requires it.

3. *Provision for fusion.*—From and after the 1st day of January, 1886, barristers and solicitors shall be fused.

4. *Prohibition of certain practices.*—The fusion of barristers and solicitors hereby provided for shall not extend to render lawful any of the following acts :—

(a) A barrister fusing with a solicitor's wife, his sister, his cousin, or his aunt, without the previous consent in writing of such solicitor, to be filed in the office two clear days previously at least.

(b) A solicitor taking a barrister's silk umbrella from a stand or other place of deposit, and leaving in substitution for the same an inferior gingham, with intent to deceive.

(c) A solicitor fraudulently holding himself out as having been a member of the bar prior to the 31st December, 1885. Provided that this clause shall not apply to any solicitor making such representation who shall, in fact, have practised regularly at any duly licensed bar for a period of seven years at least.

5. *Objections to fusion.*—Any barrister or solicitor who shall object to be fused shall state the grounds of his objection in writing on or before the said 31st of December, 1885. The document shall be on cream-wove foolscap paper, and written on one side only, with a margin of one inch, and

FLOTSAM AND JETSAM.

impressed with a £25 stamp, and shall be headed with the words, "In the matter of A. B., a proposed fusee.—Not if he knows it." Every such document shall be entered in a list, and be open for inspection at all reasonable times on payment of a shilling, but no further or other notice shall be taken of it.

6. *Consequences of fusion.*—Upon the fusion provided for by this Act taking place, the following consequences shall follow:—

(a) All persons who, on the 31st of December, 1885, shall be barristers or solicitors, shall, on and after the 1st of January, 1886, be called barristicitors, and shall, when professionally engaged, wear in front of some convenient part of their chests a circular badge of not less than six or more than twelve inches in diameter, with the word "Barristicitor" painted on it in two coats of good oil paint in legible white characters upon the black ground. Provided that—

(b) Barristers who shall, on the 31st day of December, 1885, have been Her Majesty's counsel or serjeants-at-law shall wear the said badge at the back instead of in front.

(c) No barristicitor shall wear any wig, gown, or (save for the badge aforesaid) other distinguishing mark, but it is hereby expressly declared that tourist suits, paper shirt fronts concealing flannel beneath, masher collars, and other similar abominations to outsiders shall and may be lawfully worn when addressing the Court. Provided that nothing in this Act contained shall render it unlawful for a person who, on the 31st of December, 1885, shall be a bald barrister or solicitor from wearing a chestnut wig, or prevent any person who, on that date, shall be a barrister from continuing to wear his wig and gown at fancy dress balls or private theatricals, or when entertaining friends at dinner, or when disguising himself for the purpose of effecting an escape from justice.

7. *As to fees and costs due on 31st December, 1885.*—All fees and costs respectively due to barristers and solicitors on the said 31st day of December, 1885, shall be collected and got in by them with all reasonable despatch, and shall as and when realized be paid into court to the credit of an account, to be entitled "The Barrister and Solicitor Spoliation Account." All sums paid into such account shall be expended by the Lord Chancellor and the Lord Chief Justice of England upon such objects, deserving or otherwise, as they shall think proper.

8. *Fees.*—The following fees shall and may be lawfully taken by and allowed to barristicitors:—

Where the subject-matter in dispute	£	s.	d.
shall exceed £1,000 000. For conducting the case through all its stages, inclusive of advocacy at the trial	1	5	0
In all other cases	0	12	6
And for every day on which the trial of an action shall last beyond one full day, a further allowance of			6

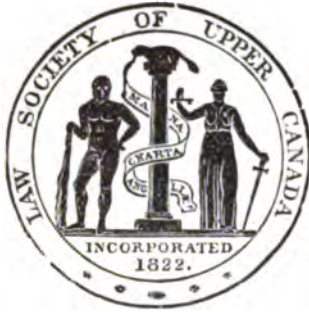
These fees shall be exclusive of court fees, stamps, and other disbursements, properly incurred, but shall include law stationers' charges, cab hire, tips to ushers, and bribes to witnesses in running-down cases.

Provided that in any case on application to the judge at the trial, and if it shall appear to him that by reason of the difficulty of the case, the number of witnesses bribed, the heat of the weather, or other special circumstances, the said allowance shall be insufficient, he may, in his discretion, grant a certificate for a further allowance not exceeding one shilling and ninepence.—*Pump Court.*

THE *American Law Review* so long as it sticks to law is very good. When it touches upon matters affecting any country not *American* it is strangely at fault; but what it is when discussing matters theological may be described by the remark of our better half when we read her some extracts from an article on the disposition of the body after death. "What rubbish are you reading? You have got hold of the ravings of a lunatic." One sentence reads thus: "A great many years ago, before common sense had suggested any doubt as to the certainty of the resurrection of the human body in its original flesh and blood." If the resurrection is looked upon as a miracle it is absurd to discuss it as a matter of "common sense." On the other hand it is generally supposed to be common sense to expect an ear of wheat from a grain of wheat sown in the ground. Common law is said to be common sense. This apostle of cremation is certainly not a common lawyer. The "original flesh and blood" theory is new, We never heard of it being taught in any school of theology in christendom. Again, when contrasting cremation and burial, the article says: "It is a process of combustion in any case. In the case of earth burial, the fire burns at the greatest possible disadvantage, prolonging in the most horrible way the agony and grief of the ones who love." A "common sense" writer should not allow his imagination to run away with him.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

During Michaelmas Term the following gentlemen were called to the Bar, namely:—John Alexander MacKintosh, Adam Carruthers, Arthur Burwash, Henry Herbert Collier, James D. S. C. Robertson, John Douglas, James Alexander Hutcheson, Joseph Alphonse Valin, James Cæsar Grace, David Thorburn Symons, Dyce Willcocks Saunders, William Torrance Allan, Edmund Weld, Thomas Bulmer Bunting, William Travis Sorley, Isaac Norton Marshall, Frank Russell Waddell, Thomas James Decatur, Alexander George Frederick Lawrence, George Weir, William James Nelson, William David Jones, William Acheson Proudfoot, David F. McArdle; and the following gentlemen were admitted to the Society as Students-at-Law, namely:—Graduates: Frank Ambridge Drake, George Watson Holmes, Arthur Stevenson, Herbert Langell Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Holton Britton. Matriculants: Alexander Clarke, Henry Augustus Wardell, Herbert Ferdinand Bonzé, Duncan Henry Chisholm, Fergus James Travers, John Thomas Hewitt, Richard Vercoe Clement, James Alexander Haight Campbell, Robert Lazier Elliott, Robert Gordon Smyth. Juniors: George Carnegie Gunn, Herbert William Lawlor, James Arthurs, William Pinkerton, George Davey Heyd, Forbes Begue Geddes, Robert Elliott Lazier, Frederick Forsyth Pardee, William Locklin Billings Lister, Reginald Murray Macdonald, Ernest Edward Arthur Duvernet, Frank Stewart Mearns, Arthur Trollope Wilgress, Stephen Dunbar Lazier, Robert Segsworth, James Henry McGhie.

During Hilary Term, 1885, the following gentlemen were called to the Bar, namely:—Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry

Hubbs, Henry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurchy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Forbes Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, E. A. Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manly German, George McLaurin, and the following gentlemen were admitted as Students and Articled Clerks, namely: Graduates, John Henry Cosgrove, Alexander Henderson, Jr.; John Arthur Tanner, Francis Alexander Anglin. Matriculants: Alfred E. Cole, Dioscore J. Hurtleau, William Charles Mikel. Juniors: William Henry Moore, George Washington Littlejohn, Arthur St. George Ellis, George Smith McCarter, William Albert Smith, Ernest Napier Ridout Burns, Edmund Sheppard Brown, John Patrick O'Gara and William Walton passed the Articled Clerk's examination.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- | | | |
|----------------------|---|--|
| 1884
and
1885. | { | Arithmetic. |
| | | Euclid, Bb. I., II., and III. |
| | | English Grammar and Composition. |
| | | English History—Queen Anne to George III. |
| | | Modern Geography—North America and Europe. |
| | | Elements of Book-Keeping. |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- | | | |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major. |
| | | Virgil, Æneid, B. V., vv. 1-361. |
| | | Ovid, Fasti, B. I., vv. 1-300. |
| | | Xenophon, Anabasis, B. II. |
| | | Homer, Iliad, B. IV. |
| 1885. | { | Xenophon, Anabasis, B. V. |
| | | Homer, Iliad, B. IV. |
| | | Cicero, Cato Major. |
| | | Virgil, Æneid, B. I., vv. 1-304. |
| | | Ovid, Fasti, B. I., vv. 1-300. |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

LAW SOCIETY OF UPPER CANADA.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received

his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886. { Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Cæsar, Bellum Britannicum.
Xenophon, Anabasis, B. V.
Homer, Iliad, B. VI.
1887. { Xenophon, Anabasis, B. I.
Homer, Iliad, B. VI.
Cicero, In Catilinam, I.
Virgil, Æneid, B. I.
Cæsar, Bellum Britannicum.
1888. { Xenophon, Anabasis, B. I.
Homer, Iliad, B. IV.
Cæsar, B. G. I. (vv. 1-133.)
Cicero, In Catilinam, I.
Virgil, Æneid, B. I.
1889. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Cicero, In Catilinam, I.
Virgil, Æneid, B. V.
Cæsar, B. G. I. (vv. 1-33)
1890. { Xenophon, Anabasis, B. II.
Homer, Iliad, B. VI.
Cicero, In Catilinam, II.
Virgil, Æneid, B. V.
Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem :—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek :—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888—Souvestre, Un Philosophe sous le toits.

1890

1887—Lamartine, Christophe Colomb.

1889

OR, NATURAL PHILOSOPHY.

Books—Arnett's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

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No. 13.

DIARY FOR JULY.

1. Wed Dom. Day, 1867. Long Vac., H. C. J., commences.
5. Sun 5th Sunday after Trinity.
6. Mon [Court and Surrogate Terms (ex York).
7. Tues Col. Simcoe, first Lieut.-Gov. U. C. 1792. County
8. Wed Cyprus ceded to England, 1878.
11. Sun County Court and Surrogate Term (ex York) end.
12. Sun 6th Sunday after Trinity.
14. Tues W. P. Howland, first Lieut.-Gov. of Ont., 1868.
15. Wed Manitoba entered Confederation, 1870.
17. Fri Law Society incorporated, 1797.
19. Sun 7th Sunday after Trinity.
20. Mon British Columbia entered Confederation, 1871.
23. Thur Union of Upper and Lower Canada, 1840.
24. Fri Canada discovered by Cartier, 1534.
25. Sat Battle of Lundy's Lane, 1813.
26. Sun 8th Sunday after Trinity. Jews first admitted to
House of Commons, 1858. Dr. Robitaille,
Lieut.-Gov. of Quebec, 1879.
27. Wed First Atlantic telegraph laid, 1866.
30. Thur Gov't of U. C. removed from Niagara to York,
1793.

TORONTO, JULY 1, 1885.

THE decision of the Court of Appeal in the cases of *West v. Parkdale* and *Carroll v. Parkdale* can hardly be said to be satisfactory. The actions were brought to recover compensation for the injury sustained by the plaintiffs as property owners, whose properties were injuriously affected by the construction of the Parkdale subway and were originally tried before Wilson, C. J. The learned Chief-Justice gave judgment (7 Ont. R. 270) in favour of the plaintiffs. This judgment was sustained by Boyd, C., and Proudfoot, J., on appeal to the Divisional Court of the Chancery Division (8. Ont. R. 59). But the Court of Appeal have reversed the judgment, Hagarty, C. J., dissenting. There are thus four judges, including three chiefs, in favour of the plaintiff, and three of the puisne judges in Appeal, Burton, Patterson, and Osler, JJ. A., in favour of the defendants and yet the plaintiff fails. It is not surprising to learn that the cases are to be carried higher.

A VALUED contributor undertakes in another place in this journal to prove that the Ontario Courts have jurisdiction in Manitoba and the North-West. He has set himself what most of us would think rather a hard task, but it must be confessed he has gone about it with great ingenuity and industry. The writer may be correct, but we venture, however, to suggest some of the difficulties which occur to us.

For present purposes we take it for granted that the facts are as he has stated them, and that the Imperial Acts he mentions as still in force have not been expressly repealed. In the first place, however, it must be remembered that as these provisions were made to meet a state of things which has long passed away, and when there were no courts in Manitoba and the N. W. T., the *raison d'être* of the provisions is gone: *Cessante ratione legis cessat et ipsa lex*. The passing of the Imperial B. N. A. Act; the constitution of the Dominion, and the incorporation of the N. W. T. with it; the passing of the Imperial Act, 34, 35 Vict. c. 28 (authorizing the Parliament of Canada from time to time to establish new provinces in any territories forming part of the Dominion, and to make provision for the administration, peace, order and good government of any territory not included in any province, and confirming the Dominion Acts 32, 33 Vict. c. 3, "for the temporary government of Rupert's Land and the N. W. T. when united with Canada"), and 33 Vict. c. 3, "to establish and provide for the government of the Province of Manitoba;" and the exercise by the Parliament of the Dominion of the powers so vested in it, by passing the Acts respecting the N. W. T., which make provision for the matters

CRIMINAL JURISDICTION IN THE NORTH-WEST TERRITORY.

mentioned by our correspondent—seem so inconsistent with the view taken by our correspondent, as to amount to a virtual repeal of the provisions he relies on by an authority acting by and under the express sanction of the same Imperial Parliament which passed the Acts which our correspondent cites.

*CRIMINAL JURISDICTION IN
THE NORTH-WEST
TERRITORY.*

In a former number was sketched the jurisdiction of the Local Courts in the North-West Territory to try Riel and the other leaders of the rebellion for treason-felony. A reference to some Imperial statutes giving criminal jurisdiction to the Courts of Upper Canada (now Ontario) in those territories will complete the sketch.

During the period of the Hudson Bay Company's *regime* the Imperial Parliament passed three Acts vesting jurisdiction over criminal offences committed in those territories in the Courts of the older Provinces.

The first was the Act of 1803, 43 Geo. III., c. 138, giving jurisdiction to the Courts of Lower Canada, but authorizing the Lieutenant-Governor of that province, in case it should appear from any of the circumstances of the crime or offence, or the local situation of any of the witnesses for the prosecution or defence, that justice may more conveniently be administered in relation to such crime or offence in the Province of Upper Canada, to issue an instrument under the great seal of Lower Canada authorizing the Court of Upper Canada to try the same.

Under this Act DeReinhard (whose case was frequently referred to during the Ontario Boundary Dispute) was tried in Quebec in May, 1818, for the crime of murder committed at the Dalles, near

Rat Portage, now within the Province of Ontario. In October, 1818, under great seal instruments issued by the Lieutenant-Governor of Lower Canada, Brown, McLellan and others were tried in York (now Toronto) for the crime of murder committed at the junction of the Winnipeg and Assiniboine rivers, now within the Province of Manitoba. In 1872 this Act was repealed on the recommendation of the Statute Law Commission.

In 1821 another Act was passed (1 & 2 Geo. IV., c. 66) regulating the fur trade and establishing a criminal and civil jurisdiction within the Hudson Bay and Indian Territories. This Act gave jurisdiction in civil actions arising in the North-West to the Courts of Upper Canada, to which we refer in another article, empowered the Crown to appoint justices of the peace, and, notwithstanding anything in the charter of the Hudson Bay Company, enabled the Crown to authorize such justices of the peace to hold Courts of Record for the trial of criminal offences and misdemeanours, but "not to try any offender upon any charge or indictment for any felony made the subject of capital punishment, or for any offence or passing sentence affecting the life of any offender, or adjudge or cause any offender to suffer capital punishment or transportation."

As to such capital offences, it provided that "in every case of any offence subjecting the person committing the same to capital punishment or transportation, the Court or any judge of any such Court, or any justice or justices of the peace before whom any such offender shall be brought, shall commit such offender to safe custody, and cause such offender to be sent in such custody for trial in the Court of the Province of Upper Canada."

This Act did not go on to provide, as did the Act of 1803, "that every such

CRIMINAL JURISDICTION IN THE NORTH-WEST TERRITORY.

offender may and shall be prosecuted and tried in the Court of the Province of Upper Canada." But this defect may perhaps be found to be remedied by the Imperial Act of 1874, 37, 38 Vict. c. 27, which provides:—

"Where by virtue of any Act of Parliament now or hereafter to be passed, a person is tried in a Court of any colony for any crime or offence committed on the high seas, or elsewhere, out of the territorial limits of such colony, and of the local jurisdiction of such Court; or if committed within such local jurisdiction made punishable by that Act; such person shall upon conviction be liable to such punishment as might have been inflicted upon him if the crime or offence had been committed within the limits of such colony, and of the local jurisdiction of the Court."

By the B. N. A. Act (s. 139) all laws in force in Canada (*i.e.*, Upper and Lower Canada) at the union, and all Courts of civil and criminal jurisdiction were continued in Ontario and Quebec subject (except with respect to such as are enacted by or exist under Imperial Acts) to be repealed or altered by the Dominion Parliament or the Provincial Legislature, according to the authority of the Parliament or Legislature under the B. N. A. Act.

This provision preserves the criminal jurisdiction of the Ontario Courts under the Imperial Act of 1821; and that jurisdiction is not, we think, affected by the "Rupert's Land Act, 1868," 31, 32 Vict. c. 106 (Imp.), which provides that after the admission of Rupert's Land into the Dominion, the Parliament of Canada may make laws and constitute Courts for the peace, order and good government of Her Majesty's subjects and others therein; "Provided that until otherwise enacted by the said Parliament of Canada, all the powers, authorities and jurisdiction of the several Courts of Justice

now established in Rupert's Land, and of all magistrates and justices now acting within the said limits shall continue in full force and effect therein."

The Ontario Courts cannot be held to come within the definition of "Courts of Justice established in Rupert's Land;" and so the criminal jurisdiction of the Ontario Courts, under the Act of 1821, cannot be held to be affected by this enactment. Besides, unless authorized by an Imperial Act, no Colonial Legislature can vary or repeal Imperial enactments applicable to such colony.

This would appear to be the effect of the Imperial Acts, 7, 8 Wm. III. c. 22, s. 9; 6 Geo. IV. c. 105, s. 56; 3, 4 Wm. IV. c. 59, s. 56; and 28, 29 Vict. c. 63, s. 2, which latter Act condenses the former enactments and declares that Colonial Laws repugnant to any Imperial Act are to be read subject to such Imperial Act, and are "to the extent of such repugnancy, but not otherwise, to be and remain absolutely void and inoperative."

In 1859 another Imperial Act (22, 23 Vict. c. 26) was passed reciting the Acts of 1803 and 1821, and empowering the Crown to authorize justices of the peace appointed under those Acts, to try in a summary way all crimes, and to punish the same by fine or imprisonment or both; but, where the offence was one punishable with death, or should not be disposed of summarily, such justices might commit the offender to safe custody and cause him to be sent in such custody for trial in Upper Canada, as provided in the Imperial Act of 1821. The Act, however, does not extend to "the Hudson Bay Company's Territories."

It would seem, therefore, that in addition to the Local Courts referred to in our former article, a Criminal Court in Ontario, having jurisdiction in capital offences, may try Riel and the other leaders of the

 JURISDICTION OF ONTARIO COURTS IN MANITOBA AND THE NORTH-WEST.

Rebellion for the felonies charged against them—provided “the justice or justices of the peace before whom such offenders shall be brought shall commit such offenders to safe custody, and cause such offenders to be sent in such custody for trial in the Court of the Province of Upper Canada,” now Ontario.

Any doubt as to the question of Ontario jurisdiction could be settled by an Act of the Parliament of Canada, passed during the present session dealing with the whole question, but not conflicting with the Imperial statute referred to. A precedent for such an Act may be found in the Upper Canada Acts of 1818 (59 Geo. III. c. 10), under which Lord Selkirk and his co-offenders were indicted by Attorney-General Robinson at the York Assizes of 1819, after the failure of the grand jury of the Western District to return a true bill against them for the misdemeanours committed by them “at Fort William in the Western District of Upper Canada” in 1816.

The Government, however, have apparently thought it best, and probably very wisely under the circumstances, to let these trials for treason-felony proceed under the law as it stands at present, without *ex post facto* legislation, a course to which the prisoners at least can have no reasonable objection. The trial by this forum will, in any case, be a rather more formal affair than a court-martial, which might have been a competent tribunal, so far as Riel and others were concerned, and it will not be so summary as the proceedings of Judge Lynch, who has been so successful in putting down crimes of lesser magnitude, but of similar atrocity, in the western wilds of the United States.

 JURISDICTION OF ONTARIO
COURTS IN MANITOBA AND
THE NORTH-WEST.

[COMMUNICATED.]

The attention of the commercial community has been called to the extraordinary and exceptional provisions of a late Act of the Legislature of Manitoba relating to “exemptions,” which seem intended to advertise Manitoba as a safe place of resort and a haven of refuge for the impetuous or dishonest: a kind of “debtor’s paradise;” and for the disallowance of which appeals are made in the newspapers, and by Boards of Trade to the Dominion Government.

While the discussion on the propriety or justice of such legislation, and of the exercise of the prerogative of disallowance by the Dominion Government in this case is going on, it may be interesting to creditors of the Manitobans to know that the Courts of Ontario have special jurisdiction in matters of contract, debt and tort—in fact, in all actions of a civil nature—arising in any part of Manitoba and the North-West Territories, by virtue of an Imperial Act of 1821, 1, 2 Geo. III., c. 66, which is still in force. The earlier sections of the Act relate to the Hudson’s Bay Company’s licenses to trade with the Indians, and the following relate to the jurisdiction of the Ontario Courts:

“6. The courts of judicature now existing, or which may be hereafter established in the Province of Upper Canada, shall have the same civil jurisdiction, power and authority, as well in the cognizance of suits as in the issuing of process, mesne and final, and in all other respects whatsoever within the said Indian Territories and other parts of North America not within the limits of either of the Provinces of Lower and Upper Canada, or of any civil government of the United States

JURISDICTION OF ONTARIO COURTS IN MANITOBA AND THE NORTH-WEST.

as the said Courts have or are invested with within the limits of the said Provinces of Lower or Upper Canada respectively; and that all and every contract, agreement, debt, liability and demand whatsoever, made, entered into, incurred, or arising within the said Indian Territories and other parts of America; and all and every wrong and injury to the person, or to property, real or personal, committed or done within the same, shall be, and be deemed to be, of the same nature, and be cognizable by the same Courts, magistrates or justices of the peace, and be tried in the same manner and subject to the same consequences in all respects as if the same had been made, entered into, incurred, arisen, committed or done within the said Province of Upper Canada, any thing in any Act or Acts of Parliament, or grant, or charter to the contrary notwithstanding; provided always, that all such suits and actions relating to lands, or to any claims in respect of lands, not being within the Province of Upper Canada, shall be decided according to the laws of that part of the United Kingdom called England, and shall not be subject to or affected by any local acts, statutes, or laws of the Legislature of Upper Canada.

Section 7 provides that all process, writs, orders, judgments, decrees and acts whatsoever to be issued, made, delivered, given and done, by or under the authority of the said Courts, or either of them, shall have the same force, authority and effect within the said Indian Territories and other parts of America as aforesaid, as the same now have within the said Province of Upper Canada.

And now comes a curious provision. Under a prior Imperial Act of 1803 (43 Geo. III., c. 138, repealed in 1872), the Lieutenant-Governor of Lower Canada was authorized (section 2) to appoint justices of the peace within the Indian Terri-

tories. Under this Act of 1821 the Crown was also authorized to appoint justices of the peace within the territories above described. By section 8 of this Act the Lieutenant-Governor of *Lower Canada* may, by commission under his hand and seal, authorize all persons appointed justices of the peace under the Act, "or any other person who may be specially named in any such commission," to act as commissioner within the territories aforesaid "for the purpose of executing, enforcing and carrying into effect, all such process, writs, orders, judgments, decrees and acts which shall be issued, made, delivered, given or done by the said courts of judicature, and which may require to be enforced and executed within the said territories," *i.e.*, the Upper Canada (now Ontario) process, etc.

The section further provides that if any party required to obey such process should resist or oppose the execution of the same, the justice or commissioner may convey, or cause to be conveyed, to Upper Canada such offender or offenders, to be dealt with by the Court there as the Act prescribes.

Another section (s. 10) gives further power to the Upper Canada Courts in the following words:—

"It shall be lawful for the Court in the Province of Upper Canada, in any case in which it shall appear expedient to have any evidence taken by commission, or any facts or issues in any cause or suit ascertained, to issue a commission to any three or more such justices to take such evidence and return the same, or try such issue; and for that purpose to hold Courts and to issue subpoenas or other processes to compel the attendance of plaintiffs, defendants, jurors, witnesses, and all other persons requisite and essential to the execution of the several purposes for which such commission or commissions had issued; and with the like power and

JURISDICTION OF ONTARIO COURTS IN MANITOBA AND THE NORTH-WEST—RECENT ENGLISH DECISIONS.

authority as are vested in the Courts of the said Province of Upper Canada; and any order, verdict, judgment or decree, that shall be made, found, declared or published, by or before any Court or Courts held under and by virtue of such commission or commissions, shall be considered to be of as full effect, and enforced in like manner as if the same had been made, found, declared or published, within the jurisdiction of the Court of the said Province.

This Imperial Act, and the jurisdiction it vests in the Courts of Ontario, have not been affected by the "Rupert's Land Act, 1868," nor by the legislation of Manitoba or the Dominion.

The B. N. A. Act, section 129, continues the laws in force in Ontario, and the Courts of civil and criminal jurisdiction there "as if the union had not been made;" subject—except as to such as are enacted by or exist under Imperial Acts—to be altered by the Dominion or Ontario according to their legislative authority under the B. N. A. Act. By section 65 the powers conferred upon the Lieutenant-Governor of Lower Canada by Acts of the Imperial Parliament, may be exercised by the Lieutenant-Governor of Quebec.

The paramount authority of the Imperial Parliament over its statutes applicable to the colonies is preserved by the Imperial Act of 1865, 28, 29 Vict. c. 63, s. 2 (following an old statute of 7, 8 Wm. III., c. 22, s. 9, and later Acts), as follows:—

"Any colonial law which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate . . . shall be read, subject to such Act, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

The practical effect of this Imperial Act of 1821 is that the Courts of Ontario have the

right to try and adjudicate upon all rights of action arising in Manitoba and the North-West; but that their writs of execution, issued to realize the fruits of such adjudication, can only be enforced there through commissioners appointed by the Lieutenant-Governor of Quebec, except where the order, verdict, judgment, or decree of the Ontario Commissioners appointed by the Ontario Courts under section 10 are operative, or can be enforced by them without the intervention of the Quebec commissioners.

It will be time enough, when the occasion arises, to discuss whether a Manitoba or North-West Court could enjoin an action brought in an Ontario Court under this Act, or whether the judgment of an Ontario Court in an action "relating to lands or to any claims in respect of lands,"—dower, for instance—decided according to the laws of England, would operate as an estoppel in a similar action relating to the same lands or claims subsequently brought in the Courts of Manitoba or the North-West.

T. H.

RECENT ENGLISH DECISIONS.

The June numbers of the *Law Reports* comprise 14 Q. B. D. pp. 837-976; 10 P. D. pp. 97-114; 29 Ch. D. pp. 1-253; 10 App. Cas. pp. 147-353.

COSTS—ACTION IN FORMA PAUPERIS.

The case of *Carson v. Pickersgill* (14 Q. B. D. 859), to which we first propose to refer, is a decision of the Court of Appeal touching the quantum of costs recoverable by a successful plaintiff who has sued in *forma pauperis*. Although the case turned on the construction of the English Judicature Rules, Ord. 16 rr. 24, 25, 26, 27, 31, it is useful for reference as containing a review of the practice on the subject both at law and in equity prior to

RECENT ENGLISH DECISIONS.

the Judicature Act. The question was whether the plaintiff who had succeeded was entitled to recover full costs from the defendant, or merely pauper costs, *i.e.*, costs out of pocket and of witnesses, and the Court determined that only pauper costs were, under the Rules, now recoverable, although it had formerly been the practice in Chancery to award "dives' costs" in such a case.

Under our Rule 428 the whole question of costs seems to be left, subject to the exceptions mentioned in that Rule, to the discretion of the judge.

INTERPLEADER BY SHERIFF — MONEY PAID TO SHERIFF UNDER PROTEST TO RELEASE GOODS.

The next case, *Smith v. Critchfield* (14 Q. B. D. 873), is a decision of the Court of Appeal on a question of interpleader law. A sheriff had seized, on a third person's land, certain goods as the property of the execution debtor; the person on whose land the goods were seized claimed them as his own, and under protest paid the amount to be levied to the sheriff in order to release the goods from execution, and the question was whether the sheriff could interplead as to the money so paid him, and whether he was entitled to protection from any action for trespass on the land on which the goods were seized.

Ord. 57, r. 1, provides "that relief by way of interpleader may be granted where the applicant is a sheriff or other officer charged with the execution of process by or under the authority of the High Court, and a claim is made to any money, goods, or chattels taken, or intended to be taken, in execution under any process, or to the proceeds or value of any such goods or chattels, by any person other than the person against whom the process issued. The Court held that the money in question came within the terms of 'money taken in execution,' and therefore that the sheriff was entitled to interplead in respect of it; and following *Winter v. Bartholomew*

(11 Ex. 704), the Court held that no substantial grievance beyond the entry and seizure of the goods having been sustained by the third party in respect of the trespass to the land, the sheriff was entitled to protection from action in respect of such trespass.

DAMAGES—NEGLECT OF COMPANY TO REGISTER TRANSFER OF SHARES.

The next case which we come to is that of *Skinner v. The City of London Marine Insurance Corporation* (14 Q. B. D. 882), in which the plaintiff claimed to recover damages against the defendants for not registering a transfer of shares made by the plaintiff. The transfer on its face purported to be made in consideration of five shillings, but the transferee had agreed that the shares should be taken at their market value on the day of the registration of the transfer, in reduction of a debt due by the plaintiff to the transferee, but this agreement was not communicated to the defendants. For eighteen months the defendants wrongfully refused to register the transfer. In the meantime the value of the shares depreciated, and the plaintiff claimed to recover as damages the loss occasioned by the depreciation of the shares; but the Court held that the plaintiff was only entitled to nominal damages. Brett, M.R., held that the company were only liable to such damages as would result from an ordinary contract by a seller of registered shares of a company, and that contract he defined to be "that the seller shall execute a valid transfer of the shares and hand the same over to the transferee, and so do all that is necessary to enable the transferee to insist with the company on his right to be registered a member in respect of such shares;" and Baggallay, L.J., thus stated the damages which would probably be the result of such refusal to register: "The plaintiff, by reason of his name remaining on the register of members might become liable for calls after-

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wards made, or to contribute on the winding up of the company;" and the fact that the defendants had no notice of the special agreement between the plaintiff and his transferee, was held to exonerate them from liability for the special damage the plaintiff had sustained.

MASTER AND SERVANT—NEGLIGENCE OF SERVANT HIRED TO DRIVE CART—LIABILITY OF HIRER OF.

The case of *Jones v. The Corporation of Liverpool* (14 Q. B. D. 890) was one in which the Court applied the rule laid down in the well-known case of *Quarman v. Burnett* (6 M. & W. 499). The action was brought to recover damages for injuries to the plaintiff's carriage, caused by the negligence of a driver of a water-cart employed to water the public streets. The water-cart belonged to the defendants, but the driver and horse were hired by the defendants from a Mrs. Dean. The Court (Grove and Manisty, J.J.) held the case to be exactly covered by the decision in *Quarman v. Burnett*, and therefore that the defendants were not responsible for the driver's negligence. Grove, J., thought the distinction between hiring, and borrowing, another person's servant, might be this: "When a driver is hired the person from whom he is hired is bound to exercise due care in selecting a man of proper skill and conduct; but it is otherwise with the lender for no reward of a servant. The person who borrows takes him *cum onere*, and is liable for his negligence whilst in the borrower's employment."

MUNICIPAL OFFICE—RESIGNATION OF MEMBER ELECT.

The next case we come to, *The Queen v. Corporation of Wigan* (14 Q. B. D. 908), involves a question of municipal law, turning on the construction of the Imperial Statute 45 and 46 Vict. c. 50, s. 36, which provides as follows:—(1) A person elected to a corporate office may at any time, by writing signed by him and delivered to the town clerk, resign the office on pay-

ment of the fine provided for non-acceptance thereof. (2) In any such case the council shall forthwith declare the office to be vacant, and signify the same by notice in writing, signed by three members of the council and countersigned by the town clerk, and fixed in the town hall, and the office shall thereupon become vacant. A. W. Ackerley who had been elected a common councillor, had written a letter of resignation and given his cheque for the prescribed fine, which had not been cashed. Subsequently he applied to withdraw his resignation, and a resolution was passed by the council refusing to accept his resignation. A rule for a mandamus to the council to command them to declare Mr. Ackerley's seat vacant was granted, which, after argument before the Court (Matthew and Smith, J.J.), was made absolute. Matthew, J., said:—"In my judgment the resignation of Mr. Ackerley's office had been completed. The only conditions required for the resignation—that a writing signed by the officer should be delivered to the town clerk, and that the fine for non-acceptance should be paid—had been fulfilled, and by s. 36, after this has been done, the council are forthwith to declare the office to be vacant."

MUNICIPAL CONTRACT—AFFIXING SEAL AFTER CONTRACT PARTLY PERFORMED.

The case of *Meliss v. Shirley* (14 Q. B. D. 911), though turning to some extent on the construction of an Act of Parliament, we deem to be of importance as illustrating a general principle of the law of contracts with corporations. The Act in question required every contract made by an urban authority, whereof the value or amount exceeded £50, to be under seal. The defendants, an urban authority, by contract not under seal employed the plaintiffs as engineers to perform certain work. The plaintiffs performed part of the work exceeding £50, and then required defendants to affix their seal to

RECENT ENGLISH DECISIONS.

the contract which they did, believing it to be for the benefit of the ratepayers that the work should be finished. Under these circumstances Cave, J., held the contract to be valid. He observes, p. 915: "Whatever the result in point of law might be if the seal had not been affixed until all the work under the contract had been done (upon which I offer no opinion), it appears to me that whilst the contract was still open, it may be fairly contended that it was to the defendant's advantage that the contract should be carried out in its integrity, and if so, that it was competent to the defendants to affix their seal and make the contract good."

Another point in the case was this: the Act in question prohibited officers of the corporation being concerned or interested in any contract or bargain made with the corporation, and provided that in case any officer should be so interested he should be incapable of afterwards holding or continuing in office, and should forfeit £50; and the question raised was whether the contract was also invalid when an officer was interested in it; and the learned judge held that the contract was not thereby made void. The general rule of construction he held to be this: "Where the legislature has prohibited a thing from being done under a penalty you must look at the purview and surrounding sections of the Act in order to see whether the effect of the prohibition is to render the act done void; or whether the legislature intended the penalty for doing it should be confined to that expressly declared by the statute." Applying this principle, he came to the conclusion that the consequences of holding that the contract was void would be so tremendous, and the penalty so out of proportion to the offence, that it would require strong language in the Act to make him come to the conclusion that the legislature intended these consequences.

NEGLECT—DIVERSION OF WAY—DUTY TO FENCE.

The next case of *Hurst v. Taylor* (14 Q. B. D. 918), was an action to recover damages alleged to have been sustained through the defendant's negligence in not fencing a path which they had diverted under statutory powers. The point in controversy is shortly stated by Manisty, J., thus: "The question which lies at the root of the case is whether or not, when a person exercising statutory rights diverts a public foot-path, shutting up part of it and substituting a new path for that part, there is duty on him so to construct the diversion that the public may use the foot-path in its diverted condition with reasonable safety." This question the Court answer in the affirmative. Lopes, J., the other member of the Court, said: "This case raises a novel point upon which there is no authority, but which can, I think, be decided upon general principles of law applicable to negligence. The law appears to me this: if a reasonably careful man might go astray in the dark at the point of diversion, then a duty is imposed upon those who under statutory powers have diverted the path, to use reasonable means to protect the public at that point."

NUISANCE—MANDATORY INJUNCTION—COMPENSATION.

In *Sellors v. Matlock* (14 Q. B. D. 928), we have a decision of Denman, J., upon a question of municipal law which is worth noting. An urban authority under a statute empowering them, if they should think fit, to "provide and maintain, in proper and convenient situations, urinals, water-closets, etc., and other similar conveniences for public accommodation, had erected on the plaintiff's land a public urinal, which was proved to be a nuisance and injurious to the business carried on on the plaintiff's premises on which was situated a petrifying well, where barristers' wigs and other interesting objects were turned into stone. The Court held, that being a nuisance, its erection was not

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justified by the statute, and a mandatory injunction for its removal was granted; and it was held that for such an injury the plaintiff was not bound to seek compensation, under a clause in the Act providing for making compensation to persons who should sustain any damage by reason of the exercise of any of the powers of the Act. Denman, J., says, at p. 934: "It was also contended that s. 308 applied, and that the remedy was by compensation and not by action. This would be so if the Act contained any powers for the board to erect urinals upon private ground, but there are none. Nor do I think it can be contended, after the decision in *Vernon v. St. James, Westminster* (16 Ch. D. 449), though decided upon somewhat different language, that the power given by s. 39 of the Act of 1875, to erect urinals 'in proper and convenient places,' carries with it a right to create a nuisance without being liable to an action."

In the Probate Division the only case we think worth noting is on

COSTS—DISCRETION OF COURT.

The case is that of *The Friedeberg* (10 P. D. 112), in which the Court of Appeal held that under Ord. 65, r. 1 (Ont. R. 428) the costs of all proceedings are now in the discretion of the Court, and therefore the general rule of practice which had previously prevailed in the Admiralty Court as to the costs of references, viz., that when more than one-fourth is struck off a claim each party pays his own costs, and when more than a third the claimant pays the other party's costs, is no longer in force, and that the Court must now exercise its discretion according to the circumstances of each particular case. The case is noteworthy for the fact that Brett, M.R., declared that the rule in question was not only not in force, but was originally wrong, because the judge who laid it down attempted thereby to fetter his own discretion and that of his successors, which he had no legal power to do.

THE EDITOR OF THE LAW REPORTS.

It was doubtless with extreme regret that the Benchers of the Law Society received the resignation of the first Editor-in-chief of the Ontario Law Reports.

Mr. Christopher Robinson began his experience as a legal reporter in 1852, though he was not actually appointed reporter to the Court of Queen's Bench until between four and five years afterwards, then taking the position of his brother, Mr. James Lukin Robinson.

When the system was introduced in 1872 of having an increased staff of editors, with an editor-in-chief to oversee their work and be responsible to Convocation that the work was efficiently and promptly done, Mr. Robinson was naturally chosen to fill that responsible office.

As a reporter, and more recently as editor-in-chief of the reports, as in everything else he has undertaken, Mr. Robinson has done his work with a skill, an accuracy, a conscientious faithfulness and a courteous kindness that has won him a reputation of which any man might be proud. Few except those who have worked under him know how true this is.

His resignation is a serious loss to the profession, and his successor, no matter how good he may prove to be, will find it difficult to fill the place of one so competent, so conscientious, and of such great experience as Mr. Robinson. We refer particularly to the conscientious discharge of the duties of this office, for we know of no position where the work could be slurred over with so little chance of detection, and where there is so little to show for the time and thought expended.

We believe that in Mr. James F. Smith the Benchers have secured the services of one who may be thoroughly relied upon in this regard, and we have reason to think that he is in other respects well qualified for the duties of the office.

LAW SOCIETY.

LAW SOCIETY.

EASTER TERM, 1885.

The following is the resumé of the proceedings of the Benchers, published by authority:—

During this term the following gentlemen were called to the Bar, namely:—

Messrs. Donald Malcolm McIntyre, with honours and gold medal; Robert Smith, John Macpherson, William Edward Middleton, John Tytler, Robert William Evans, Robert Victor Sinclair, Ernest Joseph Beaumont, James Redmond O'Reilly, George Eldon Kidd, James Chisholm, Robert Ormiston Kilgour, William Avery Bishop, Francis Gilbert Lilly, Donald Macdonald, William Beardsley Raymond, Christopher Conway Robinson, Charles Creighton Ross, John Thomas Sproule, Arthur Byron McBride. These names are arranged in the order in which the candidates appeared before Convocation for call.

The following gentlemen were granted Certificates of Fitness as Solicitors, namely:—R. Smith, A. B. McBride, F. W. Thistlethwaite, C. F. Farewell, J. R. O'Reilly, D. W. Saunders, S. O. Richards, D. Macdonald, J. Tytler, A. G. Campbell, J. Macpherson, A. C. Rutherford, H. V. Greene, G. E. Evans, W. J. Church, L. H. Patten, R. N. Ball, J. S. Garvin, T. Johnson, G. E. Kidd, A. A. Mahaffy, A. K. Goodman, H. T. Shibley, D. R. Davis, J. R. Miller, T. I. F. Hilliard, C. R. Irvine, H. Cowan, W. Masson, G. Bolster.

The following gentlemen passed their First Intermediate Examination, viz.:—G. W. Holmes with honours, first scholarship; W. P. Torrance with honours, second scholarship; W. L. Scott with honours, third scholarship; Messrs. L. W. F. Berkeley, H. H. Langton, W. C. P. McGovern, W. S. Hall and J. A. Page, with honours; and J. E. Kirkland, F. M. Field, A. B. Bartlett, J. R. Code, J. M. Balderson, R. A. Grant, A. Stevenson, J. T. Doyle, W. D. Gregory, J. E. Hansford, S. W. Broad, W. L. M. Lindsey, C. A. Ghent, T. M. Bowman, R. R. Bruce, J. M. Mussen, W. W. Jones, C. A. Blanchet, G. F. Henderson, H. M. Cleland, W. G. Burns, H. D. Cowan, E. E. L. Pilsworth, A. E. Trow.

The following gentlemen passed their Second Intermediate Examination, viz.:—R. H. Collins, with honours and first scholarship; J. M. Clark, with honours and second scholarship; and Messrs. J. S. Campbell, J. F. Cryer, John Clark, H. E. Ridley, J. H. Bobier, D. A. Givens, R. F. Sutherland, J. D. O'Neill, D. H. Cole, A. D. McLaren, A. C. F. Boulton, G. F. Burton, S. C. Mewburn, E. W. Morphy, O. L. Spencer.

The following candidates were admitted as students-at-law, namely:—

Graduates—Alexander Gray Farrell, William Henry Williams, Herbert Read Welton.

Matriculants—Samuel Storm Martin, James Henry Cooper.

Juniors—J. A. Fleming, W. G. Richards, R. M. Graham, J. P. Dunlop, W. G. Green, J. D. Lamont, C. Stiles, J. H. Denton, W. J. Whiteside, S. B. Arnold, W. Kennedy, J. R. Layton, W. L. Hatton, W. J. Williams, H. Armstrong, H. W. Ross, R. G. Pegley, A. H. Wallbridge, M. K. Cowan, J. J. Drew, M. Murdoch, G. H. Muntz, C. E. Lyons and F. C. Hastings.

MONDAY, 18TH MAY.

Convocation met.

Present—Messrs. Maclellan, Read, Moss, Foy, Morris, Ferguson, Osler, Hoskin, Irving, J. F. Smith, Martin, Murray, Mackelcan.

In the absence of the Treasurer, Mr. Irving was elected Chairman.

The various reports of the examiners and secretary in relation to the several examinations were received, considered and adopted.

Mr. Robinson's letter of 18th inst., upon the subject of editing the reports, was referred to the Reporting Committee for report to Convocation.

The petition of Mr. R. W. Evans was referred to the Legal Education Committee.

The report of the Legal Education Committee on the cases of Messrs. McCullough, Yarwood, Carson, Young, Helliwell, was received, read and adopted.

The report of the Legal Education Committee as to the legislation of last session of the Ontario Legislature on the subject of admission of members of the Bar of England, Ireland and Scotland, was received and adopted.

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The report of the Legal Education Committee upon the subject of the primary examinations and curriculum therefor, was received, read and adopted.

The report of the examiners on the case of Mr. Masson was received and adopted.

The report of the Examiners on the Law School for session 1884-85 was received, and ordered for consideration on Saturday next.

The report of the County Libraries Aid Committee was received and read. Ordered for consideration on Saturday, the Finance Committee to report thereon as to application of Lindsay Association.

Letters were read from Messrs. Langtry and Eddis upon the subject of the volunteers who were members of the Law Society but not yet called to the Bar.

TUESDAY, 19TH MAY.

Convocation met.

Present—Messrs. Mackelcan, J. F. Smith, McCarthy, Ferguson, Foy, Morris, S. H. Blake, Kerr, Murray, Read.

In the absence of the treasurer, Mr. Mackelcan was elected chairman.

The report of the Legal Education Committee on the cases of Messrs. Evans, Mahaffy, McMillan, Hilliard, Miller, Goodman, Shibley, was received, ordered for immediate consideration, and adopted in so far as the same related to the cases of Messrs. Evans, Mahaffy, McMillan, Goodman and Shibley; and as to the cases of Messrs. Hilliard and Miller, the report was referred back to the Committee for further consideration, with instructions to report generally as to the rule to be followed in such cases.

A communication was read from H. R. Hardy asking for a grant of \$100 towards the publication of a law list. It was decided to take no action in the matter.

Ordered, That all members of the Society who had given notice of their intention to present themselves for call or for admission during the present term, and who have been prevented from so doing by reason of absence upon military service in the North-West, be called to the Bar or admitted, as the case may be, without further examination and without payment of fees, upon complying with the other rules of the Society.

Ordered, That all students-at-law and

articled clerks who are on active military service shall be allowed the time during which they have been or may be absent from their offices; and also any examinations which may intervene and for which they might have presented themselves while on such service.

It was ordered that Mr. Delos R. Davis receive his certificate of fitness as a solicitor.

SATURDAY, 23RD MAY.

Convocation met.

Present—Messrs. Maclellan, Moss, J. F. Smith, Martin, Murray, Hardy, Irving, Ferguson, Osler.

Mr. Irving was elected chairman in the absence of the treasurer.

Hon. E. Blake, Q.C., was re-elected treasurer for current year.

A letter from Mr. Read, Q.C., tendering the resignation of his position as Benchet, was read. It was moved by Mr. Hardy, seconded by Mr. Maclellan, that Convocation regret that Mr. Read should contemplate retiring from a position in which his valuable services and long experience are, and have been, of great value, and direct that the secretary do write requesting him to withdraw his resignation.

The report of the Legal Education Committee on the cases of Messrs. Miller and Hilliard was received, read and adopted.

It was ordered that during the present illness of the secretary, Mr. C. B. Grasett countersign the Certificates of Fitness ordered to issue.

The report of the Finance Committee relating to the grant to the Lindsay Law Library Association was received and adopted.

The report of the County Libraries Aid Committee, which had been presented on Monday last, was adopted.

Mr. Maclellan presented the report of the Reporting Committee, which was received and adopted.

The petition of Mr. O. L. Spencer, a captain in the Grenadiers, was received.

Ordered, That Mr. Spencer's Second Intermediate Examination be allowed, his case coming within the resolution passed by Convocation on the 19th inst.

The report of the Special Committee for striking Standing Committees recommended the following names, was received and adopted.

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STANDING COMMITTEES.

Legal Education—J. Crickmore, J. H. Ferguson, D. Guthrie, J. Hoskin, J. H. Morris, C. Moss, F. Mackelcan, J. F. Smith, W. R. Meredith.

Library—J. Beaty, J. Bell, Hon. S. H. Blake, H. Cameron, J. H. Ferguson, Æ. Irving, C. Moss, Dr. McMichael, J. H. Morris.

Discipline—J. Beaty, J. Hoskin, A. Hudspeth, J. K. Kerr, F. Mackelcan, J. MacLennan, Dr. McMichael, T. Robertson, L. W. Smith, D.C.L.

Finance—Hon. S. H. Blake, Æ. Irving, J. J. Foy, Hon. A. S. Hardy, E. Martin, W. R. Meredith, H. W. M. Murray, D. B. Read, L. W. Smith, D.C.L.

Reporting—B. M. Britton, H. Cameron, E. Martin, H. W. M. Murray, J. MacLennan, D. McCarthy, F. Mackelcan, J. F. Smith, B. B. Osler.

County Libraries Aid—B. M. Britton, H. Cameron, D. Guthrie, Hon. A. S. Hardy, A. Hudspeth, J. K. Kerr, E. Martin, W. R. Meredith, T. Robertson.

Journals of Convocation—B. M. Britton, J. Foy, Hon. C. F. Fraser, J. Hoskin, J. K. Kerr, C. Moss, D. McCarthy, J. MacLennan, Hon. T. B. Pardee.

The petition of Delos R. Davis was presented, when it was ordered that \$160 be refunded him.

Pursuant to notice Mr. Moss moved,—That the Curriculum for Primary Examinations for the years 1886-1890, inclusive, be amended by adding to the English subjects for 1886 the following: "Or Ancient Mariner and Ode to the Departing Year; France, an Ode; Dejection, an Ode; To William Wordsworth, Youth and Age."

Pursuant to notice a Rule amending a Rule of 26th December, 1882, was read a first and second time, and ordered for a third reading on Friday the 29th May next.

Pursuant to notice Mr. Moss moved,—That the following be a Rule of this Society:—

Any graduate in the Faculty of Arts in any university in Her Majesty's Dominions empowered to grant such degrees, who has given four weeks notice in accordance with the existing rules, and has otherwise complied with the rules of the Society, may, upon presenting to Con-

vocation, at its meeting on the last Tuesday in June in any year, his diploma, or a proper certificate of his having received his degree, be admitted on the books of the Society as a student-at-law, and such admission shall be taken to be as on the first Monday of Easter Term.

The Rule was read a first and second time, and ordered for a third reading on Friday, 29th May next.

Mr. Moss gave notice that at the next meeting of Convocation he would introduce a Rule as follows:—

From and after the day of 1885, no person then or thereafter bound by articles of clerkship to any solicitor, shall, during the term of service mentioned in such articles, hold any office or engage in any employment whatsoever, other than the employment of clerk to such solicitor, and his partner or partners (if any) and his Toronto agent, with the consent of such solicitors in the business, practice or employment of a solicitor.

Convocation adjourned.

FRIDAY, 29TH MAY.

Convocation met.

Present — Messrs. Robertson, Crickmore, Moss, Mackelcan, Morris, Britton, Irving, Murray, Guthrie, MacLennan, J. F. Smith, L. W. Smith, Foy.

In the absence of the treasurer Mr. Irving was elected chairman.

Mr. J. Baldwin Hand's petition was received and it was ordered that the prayer of the petition be not granted.

Mr. MacLennan presented the report relating to honours and medals on the Call, and honours and scholarships on the First and Second Intermediate Examinations.

The report was received and adopted.

A letter was read from Mr. Read in reply to the secretary's letter requesting him to withdraw his resignation in which he says that he had in contemplation resigning for some time, and only postponed doing so till this term, an anniversary term of his call to the Bar, and he adheres to his resignation.

Convocation having had under consideration Mr. Read's letter tendering his resignation of his position of Benchet, with feelings of great regret accept his resignation. Whereupon it was ordered that a call of the Bench be made for the election

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of a Benchman in Mr. Read's stead for Tuesday, 8th September.

A letter from Mr. W. Stephens was read and the secretary directed to say that his case did not come within the resolutions adopted by Convocation.

The Report of the Law School was considered and it was ordered that as the required number of students did not present themselves for examination no prizes could be awarded.

The Rule relating to Rule of 26th December, 1882, was read a third time and passed as follows:—

That section 4 of the Rules for Examinations passed on the 26th December, 1882, be amended by inserting the words "at least 29 per cent. of the marks obtainable on the paper on each subject and" between the words "obtain" and "at least," where these words first occur in the second section.

The secretary was directed to have the said Rule published in *THE LAW JOURNAL*.

The Rule, as read a first and second time at the last meeting, relating to graduates was then read a third time and passed.

Pursuant to notice a Rule relating to persons engaging themselves in employment other than the employment of articled clerks during the term of their articles, was read a first and second time and ordered for a third reading on Saturday, 6th June.

Convocation rose.

SATURDAY, 6TH JUNE.

Convocation met.

Present—Messrs. Murray, J. F. Smith, Ferguson, Morris, S. H. Blake, Meredith, Irving, MacLennan, Moss, Osler.

In the absence of the treasurer Mr. Irving was elected chairman.

The letter of the treasurer dated 2nd June, 1885, in reference to his recent reelection as treasurer was received and read.

Mr. J. F. Smith presented the report relating to Mr. A. B. McBride which was received and adopted. Ordered that Mr. McBride be called to the Bar. Mr. McBride attended and was called to the Bar accordingly.

The secretary having reported that Wm. Masson had completed his service and was entitled to his certificate, it was ordered that he receive his certificate of fitness.

The Report of the Legal Education Committee on the case of Mr. G. A. Payne was received and adopted, and his examination allowed.

Mr. MacLennan from the Reporting Committee reported as follows:—

1. Your committee have had contracts prepared with Mr. O'Brien of the *LAW JOURNAL*, and Carswell & Co. of the *Law Times* for the publication of early notes on the terms directed by Convocation, and for a period of one year from the first day of July, and afterwards, subject to determination by either party on three months' notice.

2. Your committee have had under consideration the subject of an appropriation asked for by the editor towards the preparation of the next triennial digest, and recommend that the sum of \$1,000 be appropriated for that purpose to be applied by the editor in procuring any assistance he may think necessary, and to be paid when the digest is issued, the responsibility for the work to remain, as at present, with the editor and reporters.

3. The reporting work is not going well forward as on some former occasions.

In the Queen's Bench Division there are nine cases unissued all of a date prior to the thirteenth day of March. In the Common Pleas Division there are twenty-seven cases not issued of which one was delivered in August and four in December, 1884, two in January, sixteen in February and four in March last. In the Chancery Division, although a large amount of work has been done, the arrears are not yet quite worked off. With Mr. Lefroy there are thirty-eight cases unpublished and with Mr. Boomer twenty-four, about one quarter of which belongs to the year 1884. The Practice Reports are fairly well up; there are forty-four cases unpublished of which only eleven are older than March last. Complaints have been made to your Committee of some mistakes and inaccuracies in these reports, and the Committee think the complaints, to a certain extent, well founded. Your Committee think that some of the other reports would be improved by greater care on the part of the reporters. Your Committee regret to say that they have received no return from the reporter of the Court of Appeal during the present term, although specially requested to send it in. From his former returns and from those of the printers

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your Committee find that there are eleven appeal cases in the hands of the printers, but not yet published, of a date prior to November, 1884. There appear to be only two other cases in that Court yet given to the printer, and of the cases named in the reporter's return for last term it appears that there are twenty-six judgments given in and prior to January last, not one of which has yet been given to the printer. Your Committee have no means in the absence of any return of knowing how many judgments have been given since January, but it is well known there are a good many. Mr. Grant has issued one number in November, one in December, one in February and one in May of 560 pages in seven months. The last two numbers contain eleven cases, and at the same rate it would take fourteen months longer to issue all the cases to the end of 1884.

The report was received and adopted.

The secretary reported that H. C. R. Becher, Q.C., Hon T. B. Pardee, Q.C., and Hon. A. S. Hardy, Q.C., had not attended meetings of Convocation for the last three consecutive terms.

Ordered that a call of the Bench be made for the first Tuesday of Trinity Term for the election of Benchers in the places of Messrs. Becher, Pardee and Hardy.

Mr. MacLennan from Joint Committee of Finance and Reporting reported as follows upon the subject of Mr. Robinson's letter:—

The Joint Committee composed of the Finance and Reporting Committees to whom was referred Mr. Robinson's letter of 18th instant on the subject of an increase of salary for the editor-in-chief beg leave to report as follows:—

The Committee are of the opinion that the funds of the Society do not admit of any considerable permanent increase of expenditure without a very pressing necessity.

The Committee are further of opinion that the salary at present attached to the office of editor-in-chief is sufficient as long as the reporters do the work prescribed by the Rules of the Society.

Your Committee refer to Rules 143, 144, and 145 which intend that the actual execution of the reports is the duty of the

reporters, and that the duty of the editor is one of oversight.

Your Committee have communicated with Mr. Robinson with the view, if possible, of retaining his services as editor upon the footing of his labours being reduced to that of oversight and supervision as contemplated by the Rules; but your Committee regret to say that for various reasons Mr. Robinson cannot see his way to do this.

Your Committee therefore recommend that applications for the position of editor-in-chief be advertised for in the usual manner, and that Mr. Robinson be requested to retain his office until his successor is appointed.

The report was received and adopted.

The secretary was directed to communicate to Mr. Robinson that part of the third paragraph relating to his letter.

It was ordered that the usual notice for applications for editor-in-chief be published, and that the usual notice be given to every Benchers for Tuesday, 30th June.

The petition of Gerald Bolster was presented and considered. Ordered, That his certificate of fitness be allowed him, and that the usual fee be not charged.

A resolution was carried respecting Mr. Grant's neglect to make any return during the present term of his reporting work, and the backward condition of the Appeal Reports.

The secretary was directed to communicate the same to Mr. Grant forthwith.

Convocation requested the Finance Committee to take into consideration the system of ventilation of the library, and also the condition of the ceiling.

The Rule, moved by Mr. Moss at last meeting and read twice, relating to service of article clerks, was read a third time and passed.

Mr. Morris was placed on the Finance Committee in the room of Mr. Read.

Mr. Osler gave notice of motion for the first day of Trinity Term for the formation of a branch library at the Court House for the use of the profession.

J. K. KERR.

Chairman of Committee on Journals.

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NOTES OF CANADIAN CASES.

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NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

Proudfoot, J.]

[Dec. 2.]

VICKERS EXPRESS CO. v. CANADIAN PACIFIC RAILWAY CO.

*Railway Act, 1879—Express Co.—Facilities—
Parties.*

In an action by an express company against a railway company to compel the defendants to afford the plaintiffs the same "facilities" that they did to another express company, alleging that the right to employ the station agents of the railway company as agents of the express company was such a "facility," and had been refused to the plaintiffs although granted to the other express company,

Held, that such right was a "facility," and that the Canada Railway Act of 1879, s. 60, ss. 3, provides any facilities granted to one incorporated express company shall be granted to others.

Held, also, that the plaintiffs could not compel the defendants to give the use of their agents, but if the defendants allow the agents to act for one company, it is a "facility" that cannot be denied to the other company.

The action was, however, dismissed on the ground that the other express company had not been made a party, but without costs.

McCarthy, Q.C., and Creelman, for the plaintiffs.

S. H. Blake, Q.C., and R. M. Wells, Q.C., for the defendants.

Ferguson, J.]

[May 16.]

WHITLEY v. GOWDEY.

*Patent—Re-issues—Enlarging claims—Laches in
applying for re-issue.*

Action for infringement of patents of invention. When it appeared that in a re-issued patent a claim constituting a new feature was

introduced—a thing that was not in the original patent or contemplated at all by the then inventor—a feature that was shown to be of substantial importance and practical utility and which amounted to an invention and it did not appear that this change was the correction of a mistake or a thing arising by reason of accident or inadvertence.

Held, that the said claim in the re-issue was invalid.

A re-issue cannot contain matter of invention which as to the original is new, or a broadening of the invention, although it may under proper circumstances contain a broadening of a specific claim made.

Where in a re-issue one of the claims was in the same words as one of the claims in the original patent, but contained the words "substantially as shown and described," and on reference to the specifications it appeared that those of the re-issued patent contained certain additions which were not in those of the original patent, and when read with reference to the specifications the claim in the re-issued patent appeared to mean a thing different from that meant by the corresponding claims in the original patent, and the result stated in the new or added part of the specifications for the re-issued patent showed that the intention was to claim something different from that which was manifested or claimed in the original patent, and it did not appear that this change could be said to have been made for the purpose of correcting a mistake or by reason of an accident or inadvertence,

Held, the claim in the re-issued patent could not be sustained, and was invalid.

When the date of an original patent was December 6th, 1877, and the date of a re-issue of it was March 7th, 1881, and it appeared that the attention of the patentee must have been called to the merits and actual scope of his patent as early as March 7th, 1879, by reason of the disclaimer on that date; and when in the case of another patent, the date of the original was November 14th, 1876, and the date of the re-issue March 17th, 1881, and it appeared that the attention of the patentee must have been drawn towards the merits, demerits or defects in his patent as early as March 7th, 1879, for a similar reason; and when in the case of another patent, the date of the original was September 28th, 1876, and of

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the re-issue July 10th, 1880, and from the correspondence and proceedings respecting the application in the United States, it was indicated that the patentee was not during at least the larger part of this period without having his attention drawn towards the merits, demerits or defects in his patents; and it also appeared that in each case there had been in the re-issues either the introduction of new inventions or what has been called an enlarging of the scope of the patent, or a broadening of the claim,

Held, that the rule of laches must be strictly applied and the delay being unaccounted for, the re-issues were invalid, at all events as to the claims in the re-issues which constituted such a broadening and enlarging of the claims in the original patents respectively.

W. Cassels, Q.C., for the plaintiff.

B. B. Osler Q.C., and *T. S. Plumb*, for the defendants.

Proudfoot and Ferguson, J.J.] [May 21.

THOMPSON V. CANADA FIRE AND MARINE
INSURANCE CO.

Directors' consent to transfer of stock—Absence of fraud.

On appeal from the judgment of Boyd, C. (*ante*, 22 C. L. J., 70),

Held, that as the transfers complained of were within the scope and power of a board of directors, and being found upon the evidence to have been made without fraud, the appeal should be allowed and the action dismissed with costs.

McKelcan, Q.C., and *Moss, Q.C.*, for the appeal.

McCarthy, Q.C., and *Nesbitt*, contra.

Boyd, C.] [June 2.

VICKERS EXPRESS CO. V. CANADIAN
PACIFIC RAILWAY CO.

Railway Act, 1879—Express companies—Reasonableness of rates—Facilities.

In an action by an express company against a railway company and another express company to whom certain privileges were granted

by the railway company which were withheld from the plaintiffs, the principal one being that of employing the railway station agents to act as agents of the express company, and in which it was claimed that the Court should inquire into and settle whether the rates charged by the railway company were reasonable or not,

Held, that even if the Court had jurisdiction to inquire into the reasonableness of the rates, which was doubtful, no collusion being shown between the defendant companies it would not on the record and evidence in this case do so.

Held, also, that the employment of the station agents of the railway company to act as agents of the express companies with the privileges they had at the stations is a facility within the meaning of the Consolidated Railway Act of 1879, 42 Vict. c. 9, s. 60, s.s. 3, and that when such privilege is granted to one express company and refused to another, whether by contract or obligatory arrangement or not, it is an illegal bargain in contravention of this 3rd sub.-sec. of the Act.

C. Robinson, Q.C., *McCarthy, Q.C.*, and *Creelman*, for the plaintiffs.

S. H. Blake, Q.C., and *Cassels, Q.C.*, for the defendants, the railway company.

Moss, Q.C., for the defendants, the express company.

Proudfoot, J.] [June 3.

CASSELMAN V. CASSELMAN.

Estoppel by deed—Subsequent acquisition of estate—Necessity of recital or covenant—Unwilling grantee.

M. C. made a voluntary deed of certain land to L. C. At that time M. C. had no title to the land, it having been previously sold for taxes and conveyed by sheriff's deed to B. Subsequently, however, to his deed to L. C., M. C. bought back the land from B. There were no recitals or covenants in the deed to L. C., and by it M. C. did "assign, transfer, demise, release, convey, and forever quit claim" to L. C., his heirs and assigns, all his estate in the land.

Held, that M. C. was not estopped from saying he had not the estate when he conveyed

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to L. C. For (1) there was no recital or covenant for title in the deed to M. C.; (2) that deed did not purport to grant any estate in the land, but merely to assign or release and quit claim to the assignor's interest therein; (3) the deed never had any operation, for L. C. never paid anything for the land, never went into possession, never claimed to be owner of it, or paid the taxes, and from the first repudiated the gift.

McCarthy, Q.C., MacTavish and MacCraken,
for the plaintiff.

Shepley and F. M. McDougal, for the defendant.

Boyd, C.]

[June 10.]

QUEEN V. ST. CATHARINES

Indian lands—Indian reserves—Title to Indian lands—Constitutional law.

In this action the Province of Ontario sought the intervention of this Court in order that the St. Catharines Milling and Lumber Company might be restrained from trespassing and cutting timber on lands claimed by the Province. The defendants justified under license obtained from the Government of Canada in April, 1883, by virtue of which they asserted the right to cut over timber limits on the south side of Wabegon Lake in that portion of Canada situated between Lake Superior and Eagle Lake. The defendants further pleaded specially that the place in question forms part of a district till recently claimed by tribes of Indians, who inhabited that part of the Dominion and that such claims have always been recognized by the various Governments of Canada and Ontario and by the Crown; that such Indian claims are paramount to the claim of the Province of Ontario, and that the Dominion have by purchase acquired the said Indian title, and that by reason thereof as well as by inherent right the Dominion and not the Province is alone entitled to deal with the said timber limits. It was admitted that the timber lands in question are within the territorial limits of Ontario, as determined by the Privy Council.

Held, that the Indian title to the land in question was extinguished by the Dominion treaty in 1873, known as North-West Angle

Treaty No. 3, during the dispute with the Province as to the true western boundary of Ontario, and the extinction of title procured by and for the Dominion enured to the benefit of the Province as constitutional proprietor by title paramount, and it is not possible for the Dominion to preserve that title or transfer it in such wise as to oust the vested right of the Province to the land as part of the public domain of Ontario. It appears as a deduction from the legislation relating to the subject that the expressions "Indian Reserves," or "Lands reserved for Indians" had a well recognized conventional and perhaps technical meaning before and at the date of Confederation. "Lands reserved for Indians" is used in the British North America Act as a well-understood term, and that it was so is further demonstrated when one looks at the results of previous legislation in the various confederated Provinces other than Upper Canada. So also the legislation of Canada since Confederation reflects very clear light upon what was understood by those Indian Reserves. Before the appropriation of Reserves the Indians have no claim except upon the bounty and benevolence of the Crown. After the appropriation they become invested with a legally recognized tenure of defined lands in which they have a present right as to the exclusive and absolute usufruct, and a potential right of becoming individual owners in fee after enfranchisement. It is "lands reserved" in this sense for the Indians which form the subject of legislation in the British North America Act, *i.e.*, lands upon which or by means of the proceeds of which after being surrendered for sale, the tribes are to be trained for civilization under the auspices of the Dominion. It follows that lands ungranted upon which Indians are living at large in their primitive state within any Province form part of the public lands, and are held as before Confederation by that Province under various sections of the British North America Act. (See sec. 92, item 5; secs. 6, 109, and 117.) Such a class of public lands are appropriately alluded to in sec. 109 as lands belonging to the Province in which the Indians have an interest, *i.e.*, their possessory interest. When this interest is dealt with by being extinguished and by way of compensation in part reserves are allocated, then the juris-

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diction of the Dominion attaches to those reserves. But the rest of the land in which "the Indian title" so called has not been extinguished remains with its character unchanged as the public land of the Province.

History of the public lands of Ontario from the time of their acquisition by the Crown till they became subject to Provincial legislative control briefly sketched.

Discussion of the Canadian policy upon Indian questions both before and after Confederation.

Attorney-General and *W. Cassels, Q.C.*, for the Crown.

McCarthy, Q.C., and *Creelman*, for the defendants.

PRACTICE.

Q. B. Div.]

[March 4.

HATELY v. THE MERCHANTS' DESPATCH CO. ET AL.

Security for costs—Delivery out of bond—Case in the Court of Appeal.

The plaintiff who lived out of the jurisdiction obtained a verdict at the trial, which was affirmed upon motion to a Divisional Court (except as to one defendant against whom the action was dismissed without costs) and the defendants were appealing to the Court of Appeal.

Held, that the plaintiff was entitled to have his bond for security for costs taken off the files and delivered up to be cancelled notwithstanding that the judgment in the plaintiff's favour was liable to reversal in the Court of Appeal.

Aylesworth and *Lees*, for the plaintiff.

Plumb and *Millar*, for the defendants.

Proudfoot, J.]

[June 22.

RE LAKE SUPERIOR NATIVE COPPER CO.

Appeal—Extending time for.

Cross-applications in respect of the same subject-matter were argued together and both were dismissed by a judgment pronounced on

the 26th April, 1885. The question argued was an important one, viz.: the *ultra vires* of an Act. Separate orders were taken out dismissing the two applications, and the time for appealing from both orders was extended till the 6th June, on which day one of the parties gave notice of appeal from the order adverse to him. The other party who was not desirous of appealing unless his opponent appealed was advised too late to serve notice within the time limited, and therefore applied after the expiration of the time to have it extended.

Held, that it was a proper case for exercising a discretion in favour of the applicant, and leave to appeal was accordingly granted.

J. H. Macdonald, for the application.

Moss, Q.C., contra.

Boyd, C.]

[June 26.

SMITH ET AL. v. GREY ET AL.

Foreign Commission—Issue on pleadings.

For a foreign commission to be ordered it is not necessary that the cause should be technically at issue; it is sufficient to shew that some issue is raised on the pleadings which must infallibly be tried if the action be tried at all.

H. D. Gamble, for the defendants.

Arnoldi, for the plaintiffs.

OBITUARY.

HONOUR TO THE BRAVE.

The members of the London Bar have passed a resolution expressive of their deep regret at the death of their professional brother, Skeffington Connor Elliot, and of their sympathy with his parents on the occasion. Mr. Elliot was called to the Ontario Bar in 1880. A son of Judge Elliot, of London, and twenty-six years old at the time of his death, he was practising his profession successfully at Prince Albert in the North-West Territory when the rebellion under Riel commenced. The Mounted Police at Prince Albert and in its vicinity were

BOOK REVIEWS—ARTICLES OF INTEREST.

few in number and inadequate for the defence of the place and of Fort Carleton which are points where large supplies of stores are usually kept. In this situation volunteers were called for, and among those who promptly responded was Elliot. The insurgents having defied the authorities and seized private property the conflict at Duck Lake ensued on 26th March last, when out of thirty-eight volunteers nine were killed on the spot, and several wounded. Elliot had just assisted a wounded comrade into a sleigh, and turned round to resume the conflict when he fell pierced by a ball and died instantly. He had previously been wounded, but not disabled. It appears the volunteers were led into an ambuscade, and thus suffered very severely, much more so than in any succeeding conflict. But no men could have behaved more courageously. It was only when their total destruction was inevitable owing to the vastly superior numbers of the enemy and their hidden position that the remainder of the volunteer force retreated. The Mounted Police who were separated from the volunteers in the fight suffered severely also, but much less than the volunteers. The latter left the bodies of their slain companions on the field, but they were recovered afterwards, and the nine were placed in one grave. Mr. Elliot's brother, Mr. Hume Elliot, after much difficulty, succeeded in recovering the remains of the deceased which were brought to London and there interred. The funeral was a public one. The shops were closed, and every indication of the deepest sympathy and sorrow on the part of the public was exhibited. In the presence of some 20,000 people the body was interred with military honours; not only the Bar, but the City authorities and the Church of England Synod then in session have testified their sense of the courage and devotion which impelled this young member of our profession to go forth at the first call of his country to arms, and who nobly died in the performance of his duty.

FLOTSAM AND JETSAM.

AFTER a long wrangle between judge and counsel—Judge: "Well, Mr. ———, if you do not know how to conduct yourself as a gentleman, I can't teach you." Counsel: "That is so, my lord." A fact.—*Law Times*.

It having been remarked that lawyers in Texas are not in the habit of bullying witnesses, as is all too common in more civilized places, the explanation was given and accepted as reasonable that a Texas witness would just as soon begin shooting from a witness box as from anywhere else.—*Ex*.

HAD A JUDICIAL MIND.—A learned correspondent sends us the following anecdote about a justice of the peace who had a judicial mind: Squire Miller, of Coal Valley, Rock Island County, Ill., is a strict constitutionalist. A young man from Henry County procured a marriage license, and proceeding to Coal Valley, and led his blushing girl before Squire Miller to have the ceremony performed, producing his Henry County license. The Illinois statute says that "the license shall be procured in the county where the marriage is to be solemnized." The squire at first told the young man that he would have to get a Rock Island County license, as his jurisdiction did not extend outside of the county, but, on being told that the state of the young man's treasury department would not admit of such an outlay, the squire's legal mind at once hit upon a plan whereby he could bag the fee and still keep within the letter of the law. Coal Valley is only a mile from the county line between Rock Island and Henry counties, so, taking the matrimonial candidates in his buggy, he drove to the east border of the county. There they alighted, and directing the couple to stand just east of the centre of the highway the squire stationed himself on the west side of the line, and with the couple in Henry County and himself in Rock Island County, he proceeded to perform the marriage service, remarking: "There, young man, that is strictly according to law; two dollars, please." The squire has a judicial mind, and will rise higher if he lives long enough.—*Ex*.

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No. 14.

DIARY FOR AUGUST.

2. Sun.....9th Sunday after Trinity. Bat. of the Nile, 1798.
6. Thur.....Prince Alfred born, 1844.
9. Sun.....10th Sunday after Trinity
11. Tues.....Primary Examinations begin.
13. Thur.....Sir Peregrine Maitland, Lieut.-Gov. U.C., 1818.
16. Sun.....11th Sunday after Trinity.
17. Mon.....Gen. Hunter, Lieut.-Gov. U.C., 1799.
18. Tues.....First Intermediate Examinations and Primary Examinations.
20. Thur.....Graduates seeking admission to Law Society to present papers.
23. Sun.....12th Sunday after Trinity.
24. Mon.....Francis Gore, Lieut.-Gov. U.C., 1806.
25. Tues.....Solicitors' Examination and First Intermediate.
26. Wed.....Barristers' Examination.
27. Thur.....Second Intermediate Examination.
30. Sun.....13th Sunday after Trinity.

TORONTO, AUGUST 1, 1885.

Too much rich food is not good this hot weather. We therefore refrain from publishing more than one number in July and one in August. We trust that our usual custom in this respect is not unsatisfactory to our readers. It is very satisfactory to us.

We have received from the Secretary of the Board of County Judges a learned dissertation as to the jurisdiction of the General Sessions of the Peace for Ontario, read by His Honor Judge Senkler, of St. Catharines, at the last meeting of the county judges. It will appear in our next issue.

Pump Court gives its readers in a late number what it calls an endeavour, in a fragment, to suggest in Greek verse the power of the pregnant poem, "Humpty-Dumpty:—"

“ὕψι μὲν ἔξεν Οὐμπίτιος Δόμυτιος
Οὐμπίτιος Δόμυτιος φέλ δ'οὖν πλούμπιος.

This is amusing, no doubt, but for our part we think the old lines beginning—

*Humptius in muro consedit Dumptius alto
Humptius e muro Dumptius heu cecidit,*

savour of much more scholarship and quite as much wit. Nevertheless, φέλ δ'οὖν πλούμπιος is good.

RECENT ENGLISH DECISIONS.

DISCOVERY.

The first case in the June number of the *Law Reports* of the Chancery Division to which we think it necessary to refer is that of *Bidder v. Bridges* (29 Chy. D. 29), which, however, is not a very satisfactory sort of case, and as to which we are inclined to wonder why it should have been reported. It contains an elaborate discussion by Kay, J., of the principles on which a defendant is entitled to obtain discovery from a plaintiff. The case was appealed, and upon the argument the Court of Appeal without giving any reasons, which are reported, intimated that the plaintiff was bound to answer some further part of the interrogatories than Kay, J., had allowed, and counsel for both parties then agreed that the Court of Appeal as arbitrators should settle the interrogatories to be answered, which they proceeded to do, allowing, with variations, some of the interrogatories which had been wholly disallowed by Kay, J.

TRIAL BY JURY—ACTION ASSIGNED TO CHANCERY DIVISION.

The next case, *Gardner v. Fay* (29 Chy. D. 50), is also upon a point of practice, which it may be useful to note in connection with the recent decisions in *Masse v. Masse*, ante p. 179; *Pawson v. Merchants' Bank*, and *Herring v. Brooks*, ante p. 222. The plaintiff commenced an action in the

RECENT ENGLISH DECISIONS.

Chancery Division for a cause of action which by the English Judicature Act is assigned to that Division, but added thereto a claim for the return of certain goods and chattels, and damages for their detention. The plaintiff, after the defence had been put in, applied to have the issues of fact tried by a jury. But Pearson, J., held, and the Court of Appeal affirmed his decision, that the action must be tried by a judge without a jury, unless it could be made out that it was better to have it tried by a jury, and that not being shown, trial by jury was refused.

APPEAL FOR COSTS.

The case of *Stevens v. Metropolitan District Railway Co.* (29 Ch. D. 60) is deserving of a brief notice, as showing the circumstances under which an appeal on the subject of costs may be successfully maintained. The plaintiff had applied for a sequestration against the defendants for an alleged breach of an injunction. Chitty, J., on the return of the motion was of opinion that there had been a breach by the defendants of the injunction, but under the circumstances made no order except that the defendants should pay the costs of the motion, the order being prefaced with a declaration that the defendants had committed a breach of the injunction. From this order the defendants appealed. It was contended by the plaintiffs that the order being for costs only no appeal could be had; but the Court of Appeal being of opinion on the law that the defendants had not been guilty of a breach of the injunction discharged the order of Chitty, J., and gave costs to the appellants, both of the appeal and of the motion before Chitty, J.

Bowen, L.J., thus shortly states the point: "When the judge's discretion over costs depends upon the existence of some breach of an injunction or misconduct, it seems to me that an appeal lies against

his finding that there has been a breach of the injunction or misconduct, even although he only inflicts costs. Such a case is not, I think, within Ord. 65, r. 1 (Ont. R. 428). It really is an appeal against the finding, by means of which the judge clothes himself with the jurisdiction to inflict costs."

RAILWAY COMPANY—NUISANCE.

We now come to the case of *Truman v. London, Brighton and South Coast Railway* (29 Ch. D. 89), another decision of the Court of Appeal. The defendants were by their Act authorized to purchase by agreement any lands not exceeding in all fifty acres, in such places as should be deemed eligible for the purpose of receiving cattle conveyed, or to be conveyed, by their railway. The company under this power bought a piece of land adjoining one of their stations, and used it as a cattle dock. The noise of the cattle and the drovers was a nuisance to the occupiers of houses near the station, and they brought an action to restrain the defendants from continuing the nuisance. Mr. Justice North decided that the plaintiffs were entitled to the relief prayed, and the Court of Appeal affirmed his decision.

This case is important as showing the distinction between the rights of a railway company over land which they may take compulsorily for the purpose of carrying on their undertaking, and lands which they are empowered to purchase by agreement, and which are not defined by the statute. As regards the latter they are not exempt from the ordinary common law obligation so to use the land thus acquired as not to create a nuisance to occupants of neighbouring lands, unless expressly exonerated therefrom by statute.

NUISANCE—UNDERGROUND WATER—POLLUTION OF WELL.

The case which follows, viz., *Ballard v. Tomlinson* (29 Ch. D. 115), is also a case

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of nuisance, in which the Court of Appeal reversed the judgment of Pearson, J. (26 Ch. D. 194). The plaintiff and defendant were owners of adjoining lands, and had each a deep well on his own land, the plaintiff's being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and thus polluted the water which percolated underground into the plaintiff's well. The plaintiff claimed an injunction. Mr. Justice Pearson dismissed the action, but the Court of Appeal held that although the plaintiff had no property in the percolating water until he had appropriated it by pumping, and although he appropriated the water by the artificial means of pumping, he had, nevertheless, a right to restrain the defendant from polluting the source of supply. Lindley, L.J., very shortly states the principle on which the Court proceeded in the following passage: "*Prima facie* every man has a right to get from his own land water which is naturally found there, but it frequently happens that he cannot do this without diminishing his neighbour's supply. In such a case the neighbour must submit to the inconvenience. But *prima facie* no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour's land, or by putting poisonous matter on his own land and allowing it to escape on to his neighbour's land, or whether the nuisance is effected by poisoning the air which the neighbour breathes, or the water which he drinks, appears to me wholly immaterial."

CHOICE IN ACTION—EQUITABLE ASSIGNMENT.

In the case of *Percival v. Dunn* (29 Ch. D. 128) we have a decision of Bacon, V.C., holding that a mere order by a creditor to his debtor to pay a third party a certain sum of money without reference to any particular fund or debt due by the debtor, does not amount to an equitable assign-

ment. The learned judge thus stated the ground of his decision: "In *ex parte Hall* (10 Ch. D. 615), there was an order to pay out of a particular fund, and so in *Burn v. Carvalho* (4 My. & Cr. 690, 702), and *Brice v. Bannister* (3 Q. B. D. 569); and if I found in this case similar words referring to a particular fund due, or belonging to the writer of these requests, I should be bound to follow those authorities; but I find nothing like such words in these documents. There is nothing in them to the effect that the sums mentioned were to be paid out of a fund for which Dunn was answerable, or which he was under any obligation to pay."

DISENTAILING DEED—MISTAKE—RECTIFICATION.

Hall-Dare v. Hall-Dare (29 Ch. D. 133) furnishes a useful illustration of the danger incurred in combining in a disentailing deed any other matters which may properly form the subject of a separate conveyance. In this case a disentailing deed was executed, and to it was added a re-settlement of the property which could have been effected by a separate deed. In this part of the deed a mistake occurred which the suit was brought to rectify. But the Court (Bacon, V.C.) held that although the mistake was one which, if it had occurred in any other conveyance, might have been properly rectified, yet forming as it did part of a disentailing deed, the ordinary jurisdiction of the Court was by 3 and 4 Wm. IV. c. 74, s. 47 (R. S. O. c. 100, s. 36), taken away in such cases, and therefore the relief claimed must be refused.

WILL—GIFT OF RESIDUE.

The following case, *In re Rhoades* (29 Ch. D. 142), is another decision of Bacon, V.C., and turns upon the construction of a will whereby the testator bequeathed the residue of his personal estate to his wife, and after her death to his sister and three brothers in equal shares; but directed that in the event of his sister dying un-

RECENT ENGLISH DECISIONS.

married in his wife's lifetime (which happened) her one-fourth should fall into the residue. This the learned judge held did not involve an intestacy as to the sister's one-fourth share, that the meaning of the will was that if the sister survived the testator's wife, the residue was to be divided into fourths, and if she predeceased her unmarried, it was to be divisible into thirds.

EXONERATION OF PERSONALTY FROM DEBTS—MORTMAIN ACT.

Kilford v. Blainey (29 Ch. D. 145) is another decision of "the last of the Vice-Chancellors," also upon the construction of a will whereby the testatrix bequeathed her personal estate to a charity, exonerating it from debts and legacies, which she charged on her real estate—part of the bequest failed as being void under the Statute of Mortmain—and the question was whether the exoneration extended to the portion of the personalty which was the subject of the void bequest, and it was held that it did not.

LIEN OF COMPANY ON SHARES—PRIORITY.

Bradford Banking Co. v. Briggs (29 Ch. D. 149) only requires a brief notice. The defendants were an incorporated company and by their articles of association it was provided that they should have a first and permanent lien and charge on every share, for all debts due from the shareholder to the company. A shareholder deposited the certificates of his shares with the plaintiffs, his bankers, as security for the balance then due from him to them on his current account, and notice of the deposit was given to the company. Field, J., held that, notwithstanding the terms of the articles of association, the company could not claim priority over the bankers in respect of moneys which became due to the company from the shareholder, after notice of the banker's advance.

LIGHT AND AIR—ANCIENT LIGHT—REBUILDING.

Bullers v. Dickinson (29 Ch. D. 155) is a decision of Kay, J., on a question of the

right to an easement. The plaintiff had rebuilt his house which had an ancient light in the ground-floor front room, the front wall originally stood out beyond the general street line, four feet at one end and seven feet at the other; the strip, covered by this projection, had been purchased by the municipal corporation for the purpose of widening the street; and in rebuilding the front wall it was aligned with the general building line, and in the new front wall was placed a window, the position of which corresponded to a great extent with the position of the ancient light in the old front wall. The new room was about the same breadth, but owing to the alteration in the alignment of the front wall included little more than half the site of the original room. The question for determination was whether owing to the alteration in the premises the plaintiff had lost his ancient light, and it was held that he had not.

COMPANY—GENERAL MEETING—VOTING.

The case of *In re Chillington Iron Company* (29 Ch. D. 159) is a decision on a very simple question; but, inasmuch as in arriving at his conclusion Kay, J., felt compelled to go counter to the *dicta* of two such eminent judges as the late Sir Geo. Jessel and the present Master of the Rolls, it is worthy of note. The simple point was, when a poll was demanded at a general meeting of a joint stock company which, by the articles of association, was to be taken in such manner as the chairman should direct, whether the chairman could properly direct it to be taken then and there, or whether he was bound to direct it to be taken at an adjourned meeting. *In re Horbury Bridge Coal and Iron Company* (11 Ch. D. 109) Jessel, M.R., said, "We must import into the case our common knowledge that when a poll is demanded it never is taken there and then. and I am by no means of opinion that a chairman could direct it to be so taken,"

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and Brett, L.J., in the same case said, "You will have some difficulty in persuading me that if a poll is demanded a chairman can appoint it to be held there and then without notice to anybody not present." But Kay, J., was of opinion that the decision of Lord Denman in *Reg. v. D'Oyly* (12 Ad. & E. 139) was an express decision the other way that the chairman might direct the poll to be taken without any adjournment, and he so ruled.

PATENT—INFRINGEMENT—USE FOR EXPERIMENT.

The case of *United Telephone Co. v. Sharples* (29 Ch. D. 164) shows the hazards the experimental philosopher has to run in these days of advanced civilization. The defendant who carried on business as a chemist, electrician, or telegraph engineer, in the innocence of his heart imported certain apparatus from abroad; this apparatus was much less expensive than the plaintiff's patented apparatus, and was an infringement on it. In his letters to the foreign firm the defendant alleged that he was buying for the purpose of exportation abroad, and the learned judge found that such was the fact; but at the trial the defendant claimed that his letters did not disclose the true purpose of the purchase, but that he had really purchased the foreign apparatus for the instruction of his pupils and for the purposes of experiment, as the cost of them was so small he could afford to allow them to be pulled to pieces. But Kay, J., held that whether the defendant had purchased the infringements for the purpose of exportation, or for the purpose of experiment, as alleged, in either case there was a violation of the plaintiffs' right under their patent, and a perpetual injunction was granted.

MARRIED WOMEN'S PROPERTY ACT, 1882 (45 AND 46 VICT. C. 75.)

In *re Thompson v. Curzon* (29 Ch. D. 177) was an application under the Vendors and Purchasers Act, and is a decision of Kay, J., in which he came to a similar con-

clusion as to the effect of the English Married Women's Property Act, 1882, to that arrived at by Ferguson, J., recently in *Re Coulter*, ante p. 198, as to the effect of our own Married Women's Property Act, viz., that property which a married woman becomes entitled to as her separate property under the Act of 1882, she is entitled to dispose of without her husband's concurrence. In this case, under the will of a testator who died in 1875, a lady became entitled to a reversionary interest in real estate; she married in 1878, and the estate vested in possession in 1884, and it was held that the estate was separate property under the Act following *Boynnton v. Collins* (27 Ch. D. 604). From a note appended to the report, however, it appears that notice of appeal was given by the purchaser, and that thereupon the married woman and her husband by deed acknowledged conveyed her share.

VOLUNTARY SETTLEMENT—RECTIFICATION—REVOCATION.

The rectification of a voluntary settlement came up in *James v. Couchman* (29 Ch. D. 212.) The settlor had settled property in trust for the settlor for life, remainder to any wife he might marry for life, remainder to his issue, and in default or failure of issue, in trust for his paternal next of kin. And it was held by North, J., though the settlement was proper to be made, and though the settlor understood its terms, yet as his attention was not drawn to the fact that he might have had a power of disposition over the property in default or failure of issue, such a power ought to be given, and the settlement was rectified accordingly.

RENEWABLE LEASEHOLD—PURCHASE OF REVERSION BY MORTGAGOR.

The case of *Newman v. Burnett* (29 Ch. D. 231) is an important decision on the law of mortgage. One Newman being the owner of the equity of redemption of certain leasehold property as assignee of the mortgagor, applied to the owners

RECENT ENGLISH DECISIONS.

of the reversion as being *de facto* lessee to purchase the reversion, and while the negotiations were in progress borrowed of the plaintiff £300 and gave her a charge on the property which was to be conveyed to her so soon as the purchase of the reversion should be completed. Under these circumstances the plaintiff claimed priority over the mortgagees; but Pearson, J., decided that the purchase of the reversion enured to the benefit of the mortgagees, and therefore the plaintiff was not entitled to priority. At p. 234 he says, "The doctrine of this Court has always been that the mortgagor of a renewable lease can hold a renewed lease only subject to the mortgage. . . . If Newman himself were here he would be entitled to redeem the reversion on paying off the mortgages; but he would not be entitled to say to the mortgagees of the lease, I bought the property for your benefit, and you can only have it on paying me the purchase money which I gave for it. . . . It is impossible for the plaintiff to say that, in respect of the purchase money paid by Newman, she is entitled to priority over the mortgagees of the lease. I can conceive that she might be able to establish such a claim if she had advanced the money to buy the reversion; but that would be because she had no interest in the property through Newman, but was giving up a purchase on the terms of being repaid what she gave for it."

ADVANCEMENT—STATUTE OF DISTRIBUTION (22 AND 23 CAR. II. c. 10.)

The only remaining case in the June number of the Chancery Division to which we think reference necessary is that of *In re Blockley, Blockley v. Blockley* (29 Ch. D. 250) in which the point for adjudication was whether a gift by a father to his son to enable the latter to pay a debt was, on the death of the father intestate, "an advancement by portion" of the son within sec. 5 of the Statute of Distributions.

Pearson, J., held that it was, and in doing so dissented from the opinion to the contrary expressed by the late Sir Geo. Jessel in *Taylor v. Taylor* (L. R. 20 Eq. 155).

ACTION FOR MALICIOUSLY PROCURING BANKRUPTCY—BANKRUPTCY NOT SET ASIDE—DISMISSAL OF ACTION AS FRIVOLOUS AND VEXATIOUS.

We now turn to the Appeal Cases, very few of which, however, seem to call for any notice. The first case to which we direct attention is that of *The Metropolitan Bank v. Pooley* (10 App. Cas. 210) in which the House of Lords reversed an order of the Court of Appeal. The action was brought by a bankrupt to recover damages for maliciously procuring his bankruptcy, the adjudication not having been set aside. The defendant applied to dismiss the action on the ground that the facts disclosed by the statement of claim and affidavits showed it to be frivolous and vexatious. The Court of Appeal had refused the motion, but their Lordships, approving of the law as laid down in *Whitworth v. Hall* (2 B. & Ad. 695), granted the order, holding that until the bankruptcy proceedings had been set aside, they must be assumed to have been taken with reasonable and probable cause, and that therefore the plaintiff had no cause of action.

LETTERS PATENT—ESTOPPEL—PATENTEE IMPUGNING VALIDITY OF PATENT IN THE HANDS OF HIS ASSIGNEE.

The case of *Williams v. Cropper* (10 App. Cas. 249) deserves a passing notice from the fact that in it the House of Lords ruled that when a patentee becomes bankrupt, and his trustee in bankruptcy sells the patent, the patentee is not estopped from disputing the validity of the patent in the hands of the vendee. In this respect the decision of the Court of Appeal (26 Ch. D. 700) was affirmed. The case is also remarkable for another point in it arising on the pleadings. The action was brought to restrain the infringement of

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the patent. There were two defendants one of whom alone had set up and established the alleged invalidity, the Court of Appeal had held that this defence could not enure to the benefit of the other defendant who had not pleaded it, but in this respect their judgment was reversed by their Lordships. On this point the Lord-Chancellor observes at p. 256: "In those cases where the particulars have been given by a defendant who had a right to give them, and where, as I have said, the plaintiff's case throughout is not a separate case against each of the defendants, but a common case against them both, it would be strange indeed if the statute (15 & 16 Vict. c. 83, s. 41) had required a Court of law declaring the patent invalid upon evidence properly received on behalf of the person who put in the particulars, at the same time to treat it as valid against the other *in pari casu*. I do not think there is anything in the words of the statute which really requires so unreasonable a conclusion to be arrived at."

MARINE INSURANCE—INSURABLE INTEREST.

The next case, *Inglis v. Stock* (10 App. Cas. 263), is upon a point of insurance law, and affirms the decision of the Court of Appeal (12 Q. B. D. 564). The facts of the case were, that one D. sold to B. 200 tons of sugar "f.o.b. Hamburg." B. sold S. the same quantity at an increased price, but otherwise on similar terms. D. also sold S. 200 tons upon similar terms. To fulfil these contracts D. shipped 390 tons in bags. Bills of lading were sent to D. to be retained until payment was made according to the terms of the contracts. S. was insured in floating policies upon "any kind of goods and merchandise" between Hamburg and Bristol. The ship sailed from Hamburg to Bristol and was lost. On receipt of news of the loss D. allocated 2,000 bags or 250 tons to B.'s contract and 1,900

bags to S.'s contract. The action was brought by S. on his policies, and it was held that the sales being "f.o.b. Hamburg" the sugar was at the respondent's risk after shipment, and that he had an insurable interest in it, and that the underwriters were therefore liable.

EXECUTION OF DEED OF ASSIGNMENT FOR CREDITORS—EFFECT OF NOTE APPENDED TO SIGNATURE.

The case of the *Exchange Bank of Yarmouth v. Blethen* (10 App. Cas. 293) is a decision of the Judicial Committee of the Privy Council on an appeal from the Supreme Court of Nova Scotia. The plaintiffs as creditors of a firm of Dennis & Doane had executed a deed of assignment made for the benefit of the creditors of Dennis & Doane who should execute the deed; the deed contained a release of all claims due by Dennis & Doane to the plaintiffs, but the plaintiffs had attempted to qualify their execution of the deed by appending a note that they executed only in respect of certain claims scheduled to the deed which did not include the notes on which Blethen the defendant was indorser, and on which the action was brought. It appeared that the plaintiffs had received a considerable sum by virtue of the assignment, and the question was whether the plaintiffs were bound by the deed, and it was held by the Committee, affirming the judgment of the Court below, that the note appended by the plaintiffs to the deed did not amount to a refusal to execute, and that the plaintiffs having received payment under the deed could not be heard to repudiate it, and deny their execution.

AGREEMENT BY PARTNER—HIS SHARE EQUIVALENT TO SHARE OF FIRM.

The only remaining case necessary to be mentioned here is that of *Marshall v. MacLure* (10 App. Cas. 325) in which it was held by the Judicial Committee, affirming the judgment of the Supreme Court of Victoria, that according to the true construc-

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NOTES OF CANADIAN CASES.

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tion of an agreement made between one Marshall with Maclure & Co., whereby Marshall agreed to surrender to Maclure & Co. "his share" in a certain mortgage held by him as trustee for the firm of which he was a member and certain other persons—having regard to the surrounding circumstances—passed the share of Marshall's firm, and not merely his own individual share as between himself and his partner.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

QUEEN'S BENCH DIVISION.

BECKETT V. GRAND TRUNK RAILWAY CO.

*Prosecution—Railway Co.—Track not fenced—
Unlawful rate of speed—Accident—Contributory
negligence—Common law liability—Life policy
—Deduction from damages.*

The plaintiff's husband was driving in his waggon along the highway in the town of Strathroy, where it crossed the defendants' line of railway which was then unfenced. As he approached the track he did not observe any stir among the railway employes or others there, or any other signs indicating the approach of an expected or coming train. There was a curve in the line about a mile to the west beyond which a train could not be seen; there was strong evidence that the view which he might have had for some distance westward was obstructed partly by cars placed by the railway employes on the side tracks, and partly by a baggage house and other obstructions, so that he could not see far enough to enable him to avoid a train running at the rate of thirty-five miles an hour, as the defendants' train was at—the train in question was a fast train, but recently established—when there was no direct evidence that he had ever seen passing through the

town or that he knew of it. There was apparently credible evidence that after the locomotive came within hearing distance there was no sound of bell or whistle until it was so near the crossing that there was only time for two short, sharp whistles, when the collision with the waggon took place, which caused the death of the plaintiff's husband and the destruction of both horses and waggon. The alleged obstructions and the neglect to ring the bell or sound the whistle were strongly controverted by defendants' witnesses, though the evidence for the defence rather corroborated the plaintiff's witnesses in those respects.

Held, that it was altogether a case for the jury, and as it was fairly presented to them upon questions fairly put to them, which they had answered, finding in the plaintiff's favour, the Court would not interfere with their finding.

Held, also, that there was no contributory negligence on the part of the deceased.

Per O'CONNOR, J.—That the defendants, under the circumstances appearing in this case, were not only liable in damages but to a criminal prosecution as well.

Per WILSON, C.J.—That independent of any statutory enactment on the subject, the defendants were running their train too rapidly for the public safety at the place in question; and they must be governed by the same rules which govern ordinary vehicles and trains using roads which meet and cross each other, each while providing for its own safety also providing for that of others, and each having the same rights and privileges, but no higher than the other.

Held, also, *WILSON, C.J.*, dissenting, that a policy of insurance on the life of the deceased for \$3,000 had been improperly directed by the learned judge to be deducted from the damages assessed by the jury.

Per WILSON, C.J.—That the whole amount of such policy should be deducted, but in any event such deduction should be made as would represent the probable premium payable had the deceased lived, as also the interest upon such premium.

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NOTES OF CANADIAN CASES.

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WILLCOCKS V. HOWELLS ET AL.*Libel—Recovery against several—Subsequent action against others—Estoppel.*

A recovery in libel against some of several tort feorsors and payment of the amount of verdict and all costs without judgment being entered, is a bar to an action against others for the same libel.

REGINA V. RICHARDSON.*Information—Conviction—Police magistrate—Reserving case for Superior Court—Removal by certiorari of proceedings—New trial—Constitutional law.*

Held, that a police magistrate cannot reserve a case for the opinion of a Superior Court under Con. Stat. U. C. ch. 112, as he is not within the terms of that Act.

Held, also, that a defendant is not entitled to remove proceedings by *certiorari* to a Superior Court from a police magistrate or a justice of the peace after conviction, or at any time for the purpose of moving for a new trial for the rejection of evidence, or because the conviction is against evidence, the conviction not being before the Court and no motion made to quash it. But, *held*, that even had the conviction in this case been moved to be quashed, and an order *nisi* applied for upon the magistrate and prosecutor for a mandamus to the former to hear further evidence, which he had refused, both motions would have been discharged, the magistrate appearing to have acted to the best of his judgment and not wrongfully, and his decision as to the further evidence involving a matter of discretion with which the Court would not interfere.

The Court declined to hear discussed the question whether the police magistrate in this case, if appointed only by the Ontario Government, was legally and validly appointed, as his appointment should have been by the Dominion, the patent by the Ontario Government only being produced, and it not appearing that no commission by the Dominion had issued to him, nor that any search or inquiry had been made at the proper office is to the fact, the only other evidence as to the appointment besides the mere production of the Ontario patent, being the defendant's affi-

davit stating that the magistrate had no authority or appointment from the Crown or the Governor-General of the Dominion, and that he knew this "of common and notorious report."

Held, also, that the information in this case was not objectionable for not setting out the false pretences of which the defendant was convicted as it was in the form in which an indictment might have been framed, and moreover the objection was met by the 32-33 Vict. ch. 32, sec. 11, and by ch. 31, sec. 67.

IVRY V. KNOX ET AL.*Insolvency—Policy of insurance—Assignment to creditors—Reference—R. S. O. ch. 118, sec. 2.*

F. being insolvent and unable to pay his debts in full, with the intent and for the purpose, as admitted by him, of giving them a preference over other preference, assigned to certain creditors two policies of insurance, the assignment having also been obtained by the said creditors to secure the debts due them in preference to the other creditors, and they being well aware of the insolvent state of J.

The jury also found that an alleged pressure brought to bear upon J. by the creditors in question, in order to induce him to make the assignment, was not real, but simulated for the purpose of giving a preference.

Held, that the assignment was null and void under R. S. O. ch. 118, sec. 2, as against the other creditors of J., and must therefore be set aside.

IBBOTSON V. HENRY ET AL.*Replevin—Poundkeeper—Constable—Notice of action.*

Replevin will not lie against a poundkeeper. In this case the sheep which were impounded were being grazed with the consent of the owner thereof upon an open common, and were being herded by a boy in charge of them with a view to driving them home, when they were taken possession of by two constables, against the boy's remonstrance, and impounded.

Held, that the sheep were not "running at large" in contravention of a by-law of the

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municipality on the subject, and that the constables were liable in replevin for impounding them; but that replevin would not lie against the poundkeeper.

Held, also, that the constables were not entitled to notice of action (*per* O'CONNOR, J.), because even though they were, as such, public officers to distrain and impound the sheep even if they were "running at large" contrary to the by-law, they were merely "other" persons who under the by-law were empowered to take and deliver to the poundkeeper.

Per WILSON, C.J.—They were not entitled to notice unless some facts existed which might give rise to an honest belief that the sheep were at large, and that such a state of things existed, when if they had in fact existed would have justified them in impounding the sheep, but that such a state of facts did not exist under the evidence in this case.

HILLYARD V. GRAND TRUNK RAILWAY CO.

Railways—Railway Cos.—Barbed wire fence—Injury therefrom—Non-liability for rejection of evidence.

Held, that 46 Vict. ch. 18, sec. 490, subsecs. 15, 16, seemed to sanction a barb wire fence and empower municipalities to provide against injury resulting from them. Such a fence constructed by the defendants upon an ordinary country road along the line of their railway could not be treated as a nuisance, no by-law of the locality in which the accident complained of in this case having been passed respecting fences of the kind; and that the defendants were not, therefore, liable for the loss of the plaintiff's colt, which while following its dam, as the latter was being led by the plaintiff's servant, ran against the fence and received injuries resulting in its death.

But, *held*, that if the doorways of shops and the boundaries of private residences, churches, and other buildings on the sidewalks of thoroughfares, and perhaps on all sidewalks, were so fenced such fencing would be a nuisance.

Held, also, that the colt in question, five weeks old following its dam, could not be said to be running at large, the universal custom of the country which ought to govern being for colts thus to follow the dam.

Semble, that if a top rail or capping would

enable a fence of the kind to be better seen by men or animals it should be used.

Held, also, that evidence of the common use of fences of the kind in other townships, etc., should not have been rejected as showing that they were not considered dangerous or a nuisance.

COMMON PLEAS DIVISION.

Divisional Court.]

[June 27.]

GLASS V. CAMERON.

Judgment—Amendment—Setting aside at instance of third party—Locus standi.

An order was made by the Master in Chambers changing a judgment and execution against C. as executor into a judgment against him personally. The amendment was made *nunc pro tunc*; and because it was understood that it was at the desire and consent of all parties interested, it being stated that an execution issued by the M. Co. against C. personally had expired. It appeared, however, that the M. Co.'s writ had not expired, but was in full force, and that the effect of the above amendment was to cut it out. On these facts being brought to the notice of the Master on an application made by the M. Co., he made an order setting aside his previous order directing the amendment to be made.

Held, CAMERON, C.J., dissenting, that the M. Co., though strangers to the suit in which the amendment was made, had a *locus standi* to interfere to have the order directing the amendment set aside.

Osler, Q.C., for the appeal.

S. Richards, Q.C., contra.

GARLAND V. THOMPSON.

Promissory note—Sale of land—Fraud—Evidence—New trial.

To an action on a promissory note the defendant counter-claimed, setting up that the note was given in part payment of the purchase money of some land in Manitoba, which, he alleged, the plaintiff induced him to purchase by his fraud and misrepresentation as to its value and location. The jury found that the

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amount of the note with interest was \$1,590; but that the defendant had sustained damage on the purchase by reason of the plaintiff's fraudulent representations to the above amount; and judgment was entered for the defendant. On motion to set aside such judgment,

Held, that on the evidence the finding as to the fraudulent misrepresentations was not satisfactory, and therefore plaintiff should not be delayed in his recovery on the note, and a judgment was therefore directed to be entered thereon for the plaintiff; but the Court not desiring to take case arising on the counterclaim out of the jury's hands, and decide it on the material before them, they directed a new trial.

Guthrie, Q.C., for the plaintiff.

Osler, Q.C., for the defendant.

GORING V. LONDON MUTUAL FIRE INSURANCE COMPANY.

Insurance — Title—Incumbrance — Representation — Indemnity—New trial.

Action on two policies of insurance on dwelling house, barn, etc., and contents. On the face of the policies was a provision making the applications part of the policies. By the first statutory condition if the owner misrepresented or omitted to communicate any circumstance material to be made known to the company to enable them to judge of the risk, the insurance should be void so far as respects the property misrepresented. By the fourteenth statutory condition "all fraud or false swearing in relation to any of the above particulars" vitiated the claim. The insured property had been conveyed by the plaintiff's father to the plaintiff, the consideration being natural love and affection, and was made subject to a condition requiring the son to maintain and support the father and also a brother. In the application the property was stated to be held in fee simple, and to be unincumbered and this was sworn to in the proofs of loss.

Held, that the statement as to the property was a misrepresentation merely, and its materiality was a question for the jury; and in any case the misrepresentation would only apply to the building and not to the chattel pro-

perty. The learned judge at the trial having directed a verdict to be entered for the defendants on the ground that the untrue statement of itself vitiated the policy, a new trial was ordered.

Held, also, that the fourteenth statutory condition did not apply as that only referred to the particulars contained in the twelfth condition, items *c* to *e*, which have no relation to statements as to title or encumbrances.

Osler, Q.C., for the plaintiff.

Moss, Q.C., for the defendant.

MCARTHUR V. COLLINGWOOD.

Municipal corporations—Liability for damages caused by the negligent construction of drain—Compensation under arbitration clauses.

The plaintiff sued for damages to her property because of improper and negligent construction of a drain whereby, it being of insufficient capacity to carry the water brought along it, plaintiff's land was flooded. The learned judge, before whom the case was tried, entered judgment for the defendants, holding that the case was one for arbitration under the Consolidated Municipal Act.

Held, that it was not a case within the Municipal Act, and the rule was made absolute for a new trial with costs to plaintiff in any event.

Lount, Q.C., for plaintiff.

McCarthy, Q.C., contra.

BAKER V. JACKSON.

Order to hold to bail—Judgment against bail—Amount of damages—Seduction.

An action of seduction having been brought against W., a judge's order to hold to bail was obtained for bail in the sum of \$300, and a recognizance was taken in the statutory form. A judgment was obtained against W., the defendant, in the action of seduction, for \$400 damages, and \$125 costs. In an action against the bail judgment was entered against the bail for \$525.27 and costs.

Held, CAMERON, C.J., dissenting, that the judgment must be reduced to \$425.27 and the costs of this action.

Lash, Q.C., for plaintiff.

W. Douglass, contra.

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WILKINS v. McLEAN.*Foreclosure—Misrepresentation.*

One H., the mortgagee of certain property, by representing that the property was not worth the amount of the mortgage induced the parties interested in the equity of redemption to part with their estate therein. H. subsequently sold the property for \$5,000. In this suit he endeavoured to realize the amount of the mortgage on which he had advanced \$400, and in default to foreclose.

Held, that H. having acquired the equity of redemption as a trustee he must under the circumstances account for the amount at which he sold it.

Moss, Q.C., for the plaintiff.

Cassels, Q.C., contra.

BRASSERT v. McEWAN.*Sale of goods—Statute of Frauds—Rescission of contract.*

After certain goods had been sold and delivered it was discovered that the consignee was in embarrassed circumstances. After negotiations between the consignor's agent and the consignee, the consignee offered in writing to hold the goods subject to the consignor's order which was not accepted in writing by the consignor. The consignor then demanded the goods from the trustee of the creditors and on his refusal to deliver them up brought trover.

Held, that there was no valid agreement to return the goods within the seventeenth section of the Statute of Frauds.

Eddis, for the plaintiff.

George Kerr, junior, contra.

Rose, J.]

ROBBINS v. COFFEE.*Replevin—Pleading.*

In an action of replevin the first count of the statement of claim charged the defendant with taking certain goods on the premises known as the "Creemore Woollen Mills"; and the second count with taking certain goods on the premises known as the "N. & N.-W. Railway Station, at the said Village of Creemore."

The defendant for a third plea set up that one W. was tenant to the defendant of certain premises in said village known as "Block B," and certain other premises known as the "Langtry Block"; that rent was in arrear and because of such arrears of rent the defendant well avowed the taking of the said goods on the said premises, and justly so, as a distress for the said rent which still remained due and unpaid.

Held, on demurrer, third plea bad.

D. E. Thompson, for the demurrer.

H. H. Strathy, contra.

Rose, J.]

REGINA v. ARSCOTT.*Vagrant Act—Construction of.*

The Vagrant Act, 32 & 33 Vict. ch. 28 D., declares certain persons or classes of persons to be vagrants, and subject to punishment on summary conviction, amongst others "All common prostitutes or night-walkers wandering in the fields, public streets or highways, lanes, or places of public meeting, or gathering of people, not giving a satisfactory account of themselves, all keepers of bawdy houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses not giving a satisfactory account of themselves."

Held, that the Act does not declare that being a prostitute, night-walker, keeper of a bawdy house, or frequenter thereof, makes a person a criminal liable to punishment as such; but only when such persons are found at such places under circumstances suggesting impropriety of purpose, and who, on request or demand, are unable to give a satisfactory account of themselves.

Osler, Q.C., and *R. M. Meredith*, for the applicant.

Aylesworth and McKillop, contra.

Rose, J.]

VANDEWATER v. HORTON,*Action—Form of—Mortgage suits—Costs.*

In selecting the form of action regard must be had not only to the interests of the plaintiff but also to those of the defendant, and when a simple inexpensive mode of procedure is

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open and a more expensive and burdensome course is adopted it must be at the peril of costs.

The practice of bringing an action for an amount due on a mortgage within the proper competence of the Division Court in the High Court by making a claim for possession of the land is one that must be carefully guarded; and except in cases clearly indicating the necessity for proceeding in the High Court no costs will be given to the plaintiff.

In this case where the amount claimed under a mortgage was within the proper competence of the Division Court but suit brought in the High Court, and there were no circumstances shewing the necessity for bringing it, no costs were allowed to the plaintiff.

Simpson, for the plaintiff.

Burdett, for the defendant.

Rose, J.]

DONELLY V. DONELLY.

Husband and wife—Separate business—Husband interfering in—Injunction.

The plaintiff, a married woman, owned an hotel business and chattels in the hotel. The defendant, the husband, interfered with the plaintiff in the prosecution of the business, taking the receipts, interfering with the servants and maltreating the plaintiff personally, inflicting painful injuries on her person.

An injunction was granted restraining the defendant from interfering with the plaintiff in the carrying on of the business, or with the servants or agents, or with the business itself; and also from removing any of the chattel property belonging to the plaintiff and used by her in the hotel.

Seemle, that under the circumstances if it had been asked for the injunction would also have been for excluding the defendant from the hotel.

W. R. Riddell, for the plaintiff.

No one appeared for the defendant.

Rose, J.]

CHATTERTON V. CROTHERS.

Building contract—Liquidated damages for delay.

Action for balance due under a building contract. Defence: that by the contract the

plaintiff was to build the house and have the same completely finished and ready for the defendant's occupation by a named date "under a penalty of \$5 per day" to be paid by the plaintiff to the defendant for each and every day the work on said house remained unfinished after the said date, alleging that the work remained unfinished after the said date for some sixty days, making an amount of \$300 which defendant was entitled to deduct from the contract price.

Held, in demurrer defence good: that the \$5, though called a penalty, were in fact liquidated damages.

Lash, Q.C., for the demurrer.

McIntyre, Q.C., contra.

Rose, J.]

WILSON V. WOOD.

Slander—Justification—Pleading evidence in mitigation of damages

In an action of slander the statement of claim set out that the plaintiff was a solicitor, and as such was retained and instructed by one S. to let certain farming lands and collect the rents and profits thereof for and on behalf of said S., and the defendant falsely and maliciously spoke and published of the plaintiff, that "he," S., "could not get anything from plaintiff who has been collecting the rent for S.; he had never made any return to S., he has used the money himself; he has robbed him out of the whole affair, and the only thing he could do would be to send him to the penitentiary," meaning that the plaintiff was guilty of fraudulent and felonious conduct in his said business.

In the statement of defence the defendant denied all the allegations contained in the statement of claim, and in the second paragraph said that if the plaintiff established that the defendant spoke and published of the plaintiff the words charged in any of them, the defendant in mitigation of damages said that S., defendant's brother-in-law, about fifteen years ago left this Province and went to British Columbia, leaving plaintiff in full charge and control of all his real and personal estate herein; but never had been able to get any satisfactory statement of his affairs from him; that in July last defendant's sister,

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wife of S., returned to this Province with instructions from S. to get such statement from plaintiff and effect a settlement with him; that for some eight weeks she endeavoured constantly to get such statement from the plaintiff, but without avail; and therefore S. for such purpose was compelled to return to this province; that he discovered that plaintiff had received a sum of \$600 from a tenant of S.'s for which plaintiff was unable to account, and had also received other sums of money which he had converted to his own use, and that S. had never been able to obtain from the plaintiff payment of the said sums of money so received by him.

Held, on demurrer to the second paragraph of the statement of claim that it was good; that it set out facts which amounted to a justification, and if the defendant being so entitled to plead such facts as justification chooses to restrict their effect to the mitigation of damages he may do so.

Clement, for the demurrer.

Aylesworth, contra.

YOUNG V. NICHOL.

Malicious prosecution—Issuing search warrant—Reasonable and probable cause—Belief—Question for jury.

A robbery having been committed at the defendant's store a bill of an account due by the plaintiff to the defendant was found lying near by which from its crumpled appearance indicated that it had been carried about in some person's pocket; that from this fact the defendant suspected some one in plaintiff's house, and he caused a search warrant to be issued and plaintiff's house searched, but nothing was found therein. It appeared that this account was not sent but another similar one, and that on one occasion when a discussion had taken place as to the amount of the account the defendant produced the one in question. He said when he found the account in his store at the time of his robbery he had forgotten all about it not having been delivered to the plaintiff. The learned judge entered a verdict for defendant, holding that the plaintiff had failed to shew that the defendant acted without reasonable cause.

Held, that the question of the defendant's belief in the delivery of the account to the plaintiff should have been submitted to the jury, and therefore there must be a new trial.

Held, that an action of malicious prosecution will lie for issuing a search warrant without reasonable and probable cause.

Lount, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendant.

JEFFERY V. HEWIS.

Sale of land for taxes—Invalid assessment.

In the year 1875 certain land, containing 200 acres and patented as one lot, was assessed on the resident roll as lot 114, 200 acres valued at \$1,000. In 1876-8 it was similarly assessed. In 1879 it was also so assessed, and at the same rate as in the previous years except that the quantity of land was stated to be 100 instead of 200. The whole 200 acres was occupied by a tenant who duly paid the taxes for each year including 1879. On the non-resident roll for 1879 the east half of the lot appeared assessed as 100 acres valued at \$800. By reason of the land so appearing on the non-resident roll it was returned to the county treasurer as in arrear for the taxes of the year 1879 and a sale made thereof.

Held, that the assessment was of the whole lot, and the taxes were paid on the whole lot, and the fact of it being stated that the whole lot was only 100 did not make the assessment less an assessment of the whole, and the error of putting the east half on the non-resident roll could not affect the plaintiff's rights; and therefore the tax sale was invalid.

H. H. Strathy, for the plaintiff.

O'Sullivan, for the defendant.

RE BELL TELEPHONE COMPANY.

Minister of Agriculture and Commissioner of Patents—Jurisdiction of—Ministerial functions—Examination of witnesses—Certiorari.

Held, that the Minister of Agriculture as commissioner of patents has jurisdiction, under sec. 28, Patent Act of 1872, to decide any disputes as to whether a patent has become void for the non-observance or violation of the provisions of that section; and *semble* a private

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person has the right to question the validity of a patent, and that the intervention of the Attorney-General is not necessary.

Semle, also, that the minister's duties are ministerial and not judicial, and therefore his decision cannot be reviewed in a Court of law.

Held, also, that the minister is not required to examine witnesses under oath or to grant summons for the attendance of witnesses before him as the statute did not require it.

Quære, whether, if the minister act judicially, the Provincial Courts have jurisdiction to question his decision, it being that of a Court created by the Dominion Parliament.

An application for a *certiorari* to bring up all proceedings and papers before the minister for reviewal by this Court was therefore refused.

Lash, Q.C., and S. J. Wood, for the applicants.

F. Arnoldi and J. R. Roof, contra.

JACKSON V STALEY.

Libel—Publication—Evidence of

In an action of libel the alleged libel consisted of an account delivered by the defendant to the plaintiff. The account was headed "Mr. Joseph Jackson to Wm. Staley, Dr." A number of items were given with the dates, and amongst them the following: "Stole hay during winter, \$4; and stole one hatchet hammer, \$1.50." The plaintiff had been a servant of the defendant, and after a year's service, in consequence of a disagreement, left and asked for an account of amount due him for wages when the defendant sent the above account, which overbalanced the claim for wages, in an envelope by his (plaintiff's) then employer, M., who delivered it at the plaintiff's house, leaving it on the table between the plaintiff and his wife while at supper. The wife took it up and taking the account out of the envelope read it to the husband, who could neither read nor write. It did not appear that M. read the account or took it out of the envelope, and he was not called as a witness by plaintiff, or that the defendant knew that plaintiff could not read. The only evidence suggested of such knowledge was that defendant's wife had signed the contract

for plaintiff's service with defendant, but it did not appear that defendant's attention had been called to the fact, or that he knew that the signature was in the wife's handwriting, or that plaintiff could not read. The plaintiff brought an action on his claim for wages and was successful, and then under his solicitor's instructions brought his action for libel.

Held, that there was no evidence of publication and the action failed.

McIntyre, Q.C., for the plaintiff.

Britton, Q.C., contra.

BLAGDEN V. BENNETT.

Slander — Privileged occasion — Malice — School trustee.

The plaintiff, in connection with another trustee acting under the authority of the Board, purchased a quantity of firewood for use in the school-house. In December, shortly before the municipal and school trustee elections, the defendant, a rate-payer, and another school trustee were discussing the taxes when defendant said that they had paid too much for the wood; that plaintiff had culled the wood and had sold the best of it, and had drawn the culled wood to the school-house; and, on H. remonstrating with him, he said, "Oh, but he did, and I can prove it:" that he could prove it by a person named N. Subsequently, on Christmas Eve, defendant and B., a rate-payer and auditor of the school accounts, were discussing municipal matters and related a conversation he had had with W., who was a municipal councillor, that while the municipal taxes were lower the school taxes were higher; that N. had said the wood was No. 2, and it must have been culled, as No. 1 had been bought. It appeared that plaintiff, at the time he purchased for the school board, had purchased wood from the same person from whom he purchased the school board wood, which he sold on his own account. In an action of slander,

Held, ROSE, J., dissenting, that the words were spoken on privileged occasions, and there was no evidence of malice, and therefore there could be no recovery.

Carscallen, for the plaintiff.

Osler, Q.C., for the defendant.

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McNEELY ET AL. V. McWILLIAMS ET AL.*Contract in writing—Parol Evidence—
Admission of.*

The defendants wrote plaintiffs: "We will furnish scows and deliver all the stone required for the Omemee Bridge as fast as you require them, for the sum of 75 cents per cubic yard." To which plaintiffs replied: "We accept the above offer at the price and conditions named."

Held, CAMERON, C. J., dissenting, that parol evidence was admissible to show that the delivery was only to take place provided the water along the route was of sufficient height to enable defendants to use their steamer in towing the scows.

G. T. Blackstock, for the plaintiff.

Osler, Q.C., for the defendant.

BANK OF MONTREAL V. DAVIS.*Voluntary conveyance—Fraudulent preference—
Evidence of—Finding of judge on weight of
evidence.*

In an action to set aside conveyances made by a father, a merchant, to his two sons, as with intent to delay or defraud his creditors, it was found as a fact that at the time in question the father was in solvent circumstances, and owed no debt now unpaid except a sum of \$1,000 to his wife for rent, and even if there were such a debt, and enforceable against the father, it never was enforceable against the property in question, as the wife joined in the conveyances; and consequently it was not available to the plaintiffs for the purpose of setting aside such conveyances.

Held, under these circumstances, that the action must fail.

In this case the Court refused to interfere with the finding on the weight of evidence of the learned judge who tried the cause, and had seen and heard the witnesses, though they felt a difficulty in arriving at the same conclusion.

Bruce, of Hamilton, for the plaintiffs.

Robertson, Q.C., for the defendant.

ILER V. ILER.*Board—Claim by relatives—Express agreement.*

When brothers or sisters or near relatives live together as a family no promise arises by implication to pay for services rendered or benefits conferred, which, as between strangers, would afford evidence of such a promise; and so, in an action between relatives so living together for board or wages or the like, an express promise or agreement must be proved by the party urging the claim.

In this case, which was an action against a brother for board, no such promise or agreement was proved; and also for the greater portion of the time the house in which they lived was the mother's, and not that of the brother claiming the board, as by the father's will she was entitled to the use of the dwelling house during her life, and of the farm, cows and poultry, and the defendant being required to provide for her all that she should require.

Held, therefore, that the claim was not maintainable.

Aylesworth, for the claimant.

Pegley, contra.

DYMENT V. THOMPSON.*Sale of goods—Place of inspection—Acceptance of
part.*

The plaintiff, a lumber dealer and mill owner, agreed with the defendant to supply him with certain grades of lumber to be shipped on board cars at the stations nearest plaintiff's mills, and to be sent to the defendant at Hamilton; payment to be made by acceptance at three months from delivery. The lumber was shipped in car loads to the defendant from time to time, some of which the plaintiff accepted and others he rejected.

Held, that the plaintiff had the right of inspection at Hamilton, but having accepted certain of the car loads he had no right to reject the others because part did not answer the contract, unless the lumber they contained was so inferior in quality as to destroy the distinctive character of the whole of such loads; but that defendant must rely upon his action for damages, or give the inferiority in answer *pro tanto* to the claim.

McCarthy, Q.C., and Pepler, for the plaintiff.

Lount, Q.C., and Kappeler, for the defendants.

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[Prac.]

CHANCERY DIVISION.

IN RE CHAPMAN AND McLAUGHLIN.

Will—Construction of—Devise upon attaining twenty-one—Dying without children—Restraint on alienation.

A testator made his will in 1850 as follows:—"I give to my grandsons Felix and John, upon their arrival at twenty-one respectively, or to the survivors of them, should either die without lawful children, the said lot as follows: To Felix and his heirs the west half, and to John and his heirs the east half, with power to either of the said devisees or their heirs to assign to the other or his heirs but not otherwise, as I wish the said land to remain in the family." Felix attained twenty-one, and died a year afterwards without issue, never having been married, leaving a sister and John, his heirs-at-law. John attained twenty-one.

Held, that upon Felix and John attaining twenty-one, they each took a fee in the land devised to him, the dying without children meaning so dying before twenty-one.

Held, also, that the restraint on alienation was void.

PRACTICE.

Mr. Dalton, Q.C.]

[June 2.

Osler, J. A.]

[June 25.

HEWITT v. HEISE.

Adding parties—Rules 103 (a) and 108 O. J. A.

The plaintiff and one Pegg both claimed to be entitled to the principal and interest due upon a mortgage made by the defendant. The defendant paid Pegg one gale of interest, and received indemnity for the amount paid against any claim on the part of the plaintiff. The plaintiff sued claiming the gale of interest which the defendant had paid to Pegg, and the principal as upon default of payment of interest. The defendant applied to have Pegg added as a co-defendant.

Held, not a proper case for adding Pegg as a party under Rule 103 (a) O. J. A., but rather one in which a notice might be served

upon Pegg by the defendant under Rule 108 O. J. A.

Quære, per the Master in Chambers, whether the defendant might not have a remedy by interpleader.

E. B. Brown, for the motion.

Aylesworth, contra.

Proudfoot, J.]

[June 3.

SMITH ET AL. v. GOLDIE ET AL.

Patent action—Measure of damages—Form of judgment—Pleadings.

In a patent action the judgment of the Supreme Court of Canada declared that the plaintiffs were entitled to an inquiry, and to be paid the amount found due upon such inquiry, for damages sustained from the making, constructing, using, selling, or vending to others to be used, by the defendants, and by the persons to whom they have sold, given or let the same of any of the machines, etc.

The judgment gave relief beyond what the plaintiffs asked by their bill of complaint.

Held, that where the language of the decree is unambiguous, the allegations in the pleadings should not be taken into account in the inquiry as to damages, and therefore the Master was wrong in excluding evidence of damages to the plaintiffs by the use of infringing machines by persons who have bought them from the defendants.

Howland, for the plaintiffs.

Cassels, Q.C., for the defendants.

Proudfoot, J.]

[June 8.

CLAXTON v. SHIBLEY.

Tax sale—Sale for more taxes than really due—Owner present at tax sale—Estoppel—Laches—De minimis.

Action to set aside a tax sale of certain land, worth from \$600 to \$800, to meet \$6.06 taxes. It appeared that this sale was for one-quarter more taxes than were really due.

Held, that this vitiated the sale, and R.S.O. c. 180, s. 155, did not cure the error.

The maxim *de minimis non curat lex* did not apply. The subject in question was the land, not the assessment; besides, if the maxim applied at all, it was the proportion,

Prac.]

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[Prac.]

in this case one-quarter, which should be looked to rather than the actual amount.

It was proved that the plaintiff was himself present at the sale in question and purchased one lot, which was ten or eleven ahead of the lot in question, and also another lot three below it on the list; but it was not shown that he was present when the actual lot in question was sold.

Held, that he was not estopped by conduct from complaining of it.

Held, also, that the fact that the plaintiff was informed within three months after the sale of the lot having been sold, when he might have redeemed it, if such was the fact, did not deprive him of his right of action.

Walkem, Q.C., and *Machar*, for the plaintiff.
G. Macdonald, for the defendant, H. T. Shibley.

Britton, Q.C., for the defendant, S. Shibley.

Ferguson, J.]

[June 27.]

CANADIAN LAND AND EMIGRATION CO. V.
THE TOWNSHIP OF DYSART ET AL.

Payment out of court—Appeal to Supreme Court of Canada—Discretion of court.

The plaintiffs were appealing to the Supreme Court of Canada from a judgment of the Court of Appeal. The defendants applied for payment out of Court to them, as the successful parties in the action, of a sum of \$5,000 paid in by the plaintiffs and representing the whole subject-matter of the litigation.

Held, that the application was in the discretion of the Court; that that discretion should be exercised in the same way as upon an appeal to the Court of Appeal, and that the application should therefore be refused, following *King v. Duncan*, 9 P. R. 61.

Lockhart Gordon, for the plaintiffs.

W. H. P. Clement, for the defendants.

Rose, J.]

[July 2.]

COPELAND V. THE CORPORATION OF THE
TOWNSHIP OF BLENHEIM.

Costs of trial where jury disagree—Rule 428, O. J. A.

The action was tried twice. At the first trial the jury disagreed, but at the second

there was a verdict for the plaintiff, which was sustained by a Divisional Court.

Held, that the costs of the first trial were properly taxable to the plaintiff, as part of the costs which should follow the event mentioned in Rule 428, O. J. A.

Langton, for the plaintiff.

Holman, for the defendants.

Rose, J.]

[July 3.]

MCGARVEY V. THE CORPORATION OF THE
TOWN OF STRATHROY.

Costs—Scale of.

An order in Chambers referred the action, which was in the High Court, to the Master at London to assess the damages and to tax the costs to whichever party was successful in a certain appeal. There was no trial of the action and no judgment was entered. The Master assessed the damages at \$60, and taxed to the plaintiff who succeeded in the appeal his costs on the High Court scale.

Held, on appeal, that the Master had no power under the order to determine upon what scale the costs should be taxed, and therefore he was right in taxing upon the scale of the Court in which the action was brought.

Aylesworth, for the appeal.

Folinsbee, contra.

Mr. Dalton, Q.C.]

[July 4.]

TAYLOR V. COOK ET AL.

Judgment against partnership—Admission by one partner—Rule 322, O. J. A.

The statement of one partner on his examination in a suit against the firm, as to transactions which occurred during the partnership, binds all the partners, unless they seek by an examination of some of themselves to contradict or qualify the statements of the partner whose evidence they object to.

Leave was given under Rule 322, O. J. A., to sign judgment against the defendant partnership upon admissions in the examination of one partner.

Watson, for the plaintiff.

Ogden, for the defendants.

Ferguson, J.]

[July 4.]

WESTGATE V. WESTGATE ET AL.

Costs of official guardian—Fraud by infant.

The official guardian's costs of defending this action on behalf of an infant defendant were ordered to be paid by the plaintiff, notwithstanding that judgment was pronounced in favour of the plaintiff against the infant defendant, and that the latter had been found to be a party to the fraud which occasioned the action.

*Meredith, Q.C., for the plaintiff.**R. Meredith, for the adult defendant.**Lash, Q.C., for the official guardians.*

Rose, J.]

[July 11.]

DUNCAN ET AL. V. LEES.

Interpleader—Material upon which order granted—Who should be plaintiff in issue.

Interpleader orders should be granted with extreme caution, and only after strong presumptive evidence of the goods being the debtor's, which should ordinarily appear by his being in possession, by an affidavit of the belief of the sheriff if he has such belief, and by a similar affidavit of the execution creditor.

A sheriff, instructed by the execution creditor, went to the store which had been the defendant's, found the claimants in possession and their name over the door, and notwithstanding this and without further inquiry made a seizure. Upon a claim to the goods being made, the sheriff applied for an interpleader order, swearing positively that the seizure was of goods and chattels belonging to the defendant. It was admitted that the defendant had made an assignment of all his property before the seizure.

Held, that an interpleader order should not have been granted, and an order was made barring the execution creditors.

Seemle, that if the claimant be in possession at the time of the seizure, the execution creditor should be plaintiff in the interpleader issue.

*Shepley, for the claimants.**Akers, for the execution creditors.**Aylesworth, for the sheriff.*

BOOK REVIEWS.

SUPPLEMENT TO O'BRIEN'S DIVISION COURT MANUAL. By Henry O'Brien, Barrister-at-Law, Toronto. Carswell & Co., Law Publishers, 1885.

THIS little volume comes opportunely to bring down to date all matters affecting Division Court law and practice. It contains the amendments to the Division Courts Acts passed in 1882, 1884 and 1885, together with the New Rules and Tariff of Fees, which came into force on January 1, 1885, to which is added a complete digest of all the Ontario cases decided since the publication of the previous parts of the Manual. This is a new feature and a very useful one. There is also a list of the Division Court clerks and bailiffs corrected to date. The Index we are glad to notice covers not only the new material, but also the matter contained in the Manual of 1880; the annoyance of a third Index is thus obviated. The present supplement is printed so as to bind up with the Manuals of 1879 and 1880, and with them forms a compact volume giving the information contained in a very accessible form.

Instead of giving any remarks of our own as to the manner in which the editor has done his work we quote the following extract from a letter received by him from the learned Chairman of the Board of County Judges, than whom no one could be found more competent to give an opinion: "It is very nicely got up and with the digest of cases will be a valuable aid to the judges, practitioners and to the general public who have to resort to the Courts. You are entitled to much credit for the careful way in which you have prepared the work."

These Courts are now, with their increased jurisdiction and extended powers, much more important forums than they formerly were; and a handy volume giving easy access to their practice and procedure will be very useful as well to the officers as to the large number of the legal profession, who, especially in country places, have the conduct of cases passing through them.

CORRESPONDENCE.

CORRESPONDENCE.

OUR OTTAWA LETTER. •

To the Editor of the LAW JOURNAL.

The long agony is over ; the guns are firing, the troops drawn up and his Excellency ready to tell us how good and useful our legislation has been, and how Canada will flourish in consequence of it ; including of course the Franchise Bill—so *conservative* when brought in and so very *liberal* now, as to give all but manhood suffrage, and that too in certain places and to certain people who had it before. The cry of the innocents doomed to slaughter has gone up unregarded ; some forty of them, whom their fathers and godfathers held to be masterpieces of legislation are doomed to "carry their beauties to the grave and leave the world no copies"—by the Queen's Printer. The ten thousand questions have been asked, and answered in forms which the questioners by no means accepted as to be noted Q. E. D. like those put and answered in Euclid. The voice of the great querist is silent, and ministers who have been subjected to that inquisitorial mode of torture enjoy the quiet of a silence which they admit to be golden, though the speech of the querist was by no means silver to their ears. The expectant Commissioners of Railways, Judges of the Court of Claims, Commissioners in Bankruptcy, and Registrars in the N.-W.T. feel now like Tantalus when the water fled from his lips ; but hope like Tantalus that another session may give them the prizes that have now eluded them. The 200 expectant Revising Officers are enjoying that delight which attends the prospect of enjoyment of the sweets of office ; and albeit the amount and value of those sweets have not yet taken positive form and substance, yet the anticipation of the unknown quantity thereof is perhaps not less delightful than the reality will be. Sir John will see that they are good and sufficient.

But what more need I tell ? Are not all those things written in 3,700 pages of the *Chronicles of Hansard*, where the eloquence of the 211 Commoners of Canada is recorded in letters of light for future generations to admire and compare with the works of Demosthenes and Cicero, or Chatham and Gladstone. They differ mainly from those of the great orators of old in not declaring what they believe ought to be the policy of the future, contenting themselves with attacking or defending what has been done, according as it was done by Tory or by Grit, and seeming to be

convinced beyond a doubt that they must be right if they can show that their opponents have gone astray.

"Each tries by others' faults his own to smother,
And the great argument is,—'You're another.'"

But on one subject all agreed ; Tory and Grit stood up together, and praised as they ought our citizen soldiers and the excellent soldiers who led them : Middleton and Strange, Otter and Williams, received the praises they so well merited. Nor were the men forgotten ; and it was told in eloquent words how, when rebellion reared its head in the North-West, and their country called its citizen soldiers to arms :

"The loyal then at once arose
As one brave man,—and to their foes,
Soldier and soldier citizen,
Their faces turned, and struck,—and then
Beneath the blow the rebels quailed,
And sympathizing brigands failed."

And then, when the mortal remains of Osgoode and Rogers were committed to the grave, their fellow citizens of the Canadian Metropolis turned out in sorrowing crowds, and honoured the heroic dead as patriots should honour those who die for their country. Young and old, rich and poor, Tory and Grit, French and English, formed one long procession of mourners sorrowing for the dead, but proud that the dead were their countrymen.—

"Such honours Canada to valour paid,
And peaceful slept each gallant soldier's shade."

Yours most truly,

A PROUD MOURNER.

Ottawa, July, 1885.

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DIARY FOR SEPTEMBER.

1. Tues.....Ct. of App. Sittings. Long vac., H. C. J., ends, Solicitors' Ex. Beauharnois, Governor of Canada, 1726.
2. Wed.....Barristers' Examination.
3. Thur.....Divisional Court Sittings, Chan. Div., H. C. J.
6. Sun.....15th Sunday after Trinity.
7. Mon.....Trinity Term Law Society begins.
8. Tues.....County Court Sittings (York) begin.
10. Thur.....Sebastopol taken, 1855.
11. Fri.....Peter Russell, President, 1796.
12. Sat.....Frontenac, Governor of Canada, 1672.
13. Sun.....15th Sunday after Trinity. Quebec taken by British under Wolfe, 1759. O'Connor, J., C.P., 1884.

TORONTO, SEPTEMBER 1, 1885.

We understand that Mr. Thomas Hodgins, Q.C., is preparing, and will shortly issue, an edition of the Franchise Act, with notes similar to the "Manual on Voters' Lists," published by him a few years ago.

We have much pleasure in publishing in this issue a learned and exhaustive paper by His Honor Judge Senkler, of St. Catharines, on the Jurisdiction of the Courts of General Sessions of the Peace in the Province of Ontario. It is a very valuable summary of the learning on the subject. The paper was read before the Board of County Judges at their last meeting.

A CORRESPONDENT calls attention in a letter which we publish elsewhere to what he considers a serious abuse, viz., allowing barristers and solicitors to practise as such whilst holding office as police magistrates and justices of the peace. These fountains of justice should be kept free from even the appearance of pollution, and the subject is one worthy of considera-

tion by those in authority. If the objections alluded to are well taken let police magistrates be properly paid and retire from all professional business. It might also in connection with the above be considered whether these magistrates should have the power to try some of the very important cases which now sometimes come before them. We should be glad to have the views of correspondents on this subject.

ASSIGNMENT OF CHOSE IN ACTION—RIGHT OF SUIT.

Prior to the 35 Vict. c. 12 (O.), now R. S. O. c. 116, ss. 6-11, a difference prevailed at law and in equity in this Province as to the effect of an assignment of a chose in action. At law, except in the case of negotiable instruments, an assignee of a chose in action could not in general sue for its recovery in his own name. An exception existed where the chose in action was a debt, and the debtor had expressly assented to the assignment (*Surtees v. Hubbard*, 4 Esp. 204). Privity between the debtor and assignee was absolutely necessary, otherwise no direct liability from the former to the latter was created (*Price v. Easton*, 1 N. & M. 303). Theoretically, at law, a chose in action was not assignable. The inconveniences resulting from this theory, were, however, to some extent surmounted even at law, by the right which the assignee had, to use the name of the assignor as plaintiff in any action he might desire to bring for the recovery of the chose in action assigned.

On the other hand this theory of the common law was never adopted in equity,

EFFECT OF ASSIGNMENT OF CHOSE IN ACTION ON RIGHT OF SUIT.

and Courts of Equity were accustomed to recognize the right of an assignee of a chose in action arising on contract, and would entertain a suit by the assignee in his own name for the recovery of the chose in action assigned. The Court of Chancery would not, however, entertain jurisdiction prior to R. S. O. c. 49, s. 21, to enforce such claims where the assignee could recover at law by using the name of the assignor as plaintiff.

With regard to equitable choses in action assigned, these being only recoverable in equity, wherever the assignment was absolute, the assignor was an unnecessary party to a suit for its recovery. If, however, the assignor retained an interest in the chose in action assigned, he was required to be a party to the proceedings. With regard to suits in equity respecting legal choses in action, the case was different, and the assignor was required to be added even though the assignment were absolute, because any proceedings by the assignee would not constitute a bar to proceedings at law by the assignor for the recovery of the chose in action assigned.

The effect of R. S. O. c. 116 s. 7, was to enable legal choses in action arising out of contract to be assigned, so as to confer on the assignee a legal title which he could enforce in a court of law in his own name. While a good equitable assignment of a chose in action arising out of contract may be made by parol (*Heath v. Hall*, 2 Rose 271; 4 Taunt 326), an assignment of a legal chose in action, to be a valid transfer of the legal title under the statute, must be in writing.

Since the Judicature Act the difference which formerly existed between courts of law and equity is abolished, the court which now exists for the determination of civil rights, is at once a court of law and a court of equity, and according to the oft quoted sec. 17. and the Judicature Act

ss. 10, whenever there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity are to prevail.

It therefore becomes a question whether the former rules of equity or the rules of the common law, as altered by statute (R. S. O. c. 116), as regards parties to suits for the recovery of choses in action which have been assigned, are to govern the High Court of Justice.

In the recent case of *Ward v. Hughes*, 8 O. R. 138, it seems to have been assumed by the Common Pleas Division that the question is now altogether governed by the statute. It seems open to doubt, however, whether this is the proper conclusion. In that case the action was brought on a covenant in a mortgage for the payment of the mortgage debt. The plaintiff was the mortgagee, but he had assigned the mortgage to one Turner, who had assigned it to the plaintiffs' wife. The defendant contended that the action should have been brought by the latter. Evidence was given, however, on behalf of the plaintiff to show that the assignments though absolute in form were not so in fact, but only assigned part of the beneficial interest in the mortgage debt, and it was argued that therefore the assignments were not within the statute R. S. O. c. 116, inasmuch as the assignee was not entitled to the whole beneficial interest in the chose in action assigned. Under such a state of facts as was disclosed by the plaintiff, a court of equity would have held that both assignor and assignee were necessary parties to the action, but the majority of the judges of the Common Pleas Division seem to have been of opinion that the question was governed entirely by the statute, and that the assignee taking under an assignment absolute in form must sue, and they appeared to incline to the opinion that he alone was a necessary party. A

THE JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE.

new trial, however, was granted with leave to amend, and Rose, J., therefore refrained from giving any opinion on the point of practice.

It might be said that as regards purely common law demands the rules of the common law as altered by statute are still to prevail. But the fact is that even prior to the Judicature Act the Court of Chancery had by statute acquired a complete concurrent jurisdiction with the courts of law in all civil proceedings (R. S. O. c. 49. s. 21).

Prior to the Judicature Act, therefore, the Court of Chancery could have entertained jurisdiction to enforce payment of a purely common law demand, and would have applied to a suit brought in respect of such a cause of action the same rule as to parties as it applied to other suits within its jurisdiction. The R. S. O. c. 116, though it enlarged the jurisdiction of courts of law by enabling them to entertain suits by assignees of choses in action in certain cases, did not, according to well understood equity doctrine, deprive the Court of Chancery of jurisdiction, or alter or interfere with its procedure. It gave in effect a legal status to the assignee, where before he had a merely equitable one. This enlarged the jurisdiction of the courts of law but did not affect the jurisdiction of the Court of Chancery.

We are inclined to think, therefore, that the question of parties to actions to recover choses in action which have been assigned, is now governed not exclusively by the statute R. S. O. c. 116, but rather by the practice formerly prevailing in the Court of Chancery as modified by the R. S. O. c. 116. For example, as we have seen in suits respecting legal choses in action, the assignor was, in equity, a necessary party even though the assignment were absolute, because he would not otherwise be barred from proceeding at law, but since the statute, R. S. O. c. 116, in those cases

where the assignee acquires a legal title that reason would no longer prevail, and the presence of the assignor might, therefore, be dispensed with.

The question, it appears to us, is no longer whether in a court of law an assignee could have sued alone, but whether in a court of equity he could have sued alone, and each Division of the High Court being as we have said a court of law and equity is bound to see that according to the principles of equity the proper parties are before it.

JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE IN ONTARIO.

The office of Justice of the Peace and the Court of Quarter Sessions were evidently in existence in what is now the Province of Ontario before the meeting of the first Parliament of the Province of Upper Canada. This is clear from the language of several of the statutes passed at the first session of this Parliament which met at Niagara on the 17th September, 1792. By chapter 5 the magistrates of each and every district in the Province in Quarter Sessions assembled were empowered to make orders and regulations for the prevention of accidental fires within the same. By chapter 6 any two or more justices of the peace, acting under and by virtue of his Majesty's commission within the respective limits of their said commissions, were empowered to hold Courts of Request within their respective divisions, which divisions were to be ascertained and limited by the justices assembled in General Quarter Sessions, and by chapter 8 the justices of the peace for the several districts in Quarter Sessions assembled were authorized to procure plans and elevations of a gaol and court house, and approve of one of

 THE JURISDICTION OF THE COURTS OF GENERAL SESSIONS OF THE PEACE.

them and contract for the building of such gaol and court house. By statutes passed in subsequent sessions of the same Parliament the times of holding these Courts were fixed and changed, and by subsequent Parliaments the existence of these Courts was recognized, but it was not until the first session of the third Provincial Parliament which met on the 29th May, 1801, that the statute 41 George III., chapter 6 was passed, by which—after reciting that doubts had arisen with respect to the authority under which the Courts of General Quarter Sessions of the Peace, the District Courts, the Surrogate Courts and the Courts of Request had been created and were then holden in the several districts of the Province, and also the authority under which commissions of the peace, commissions of assize and nisi prius, commissions of Oyer and Terminer, commissions to sheriffs and other persons concerned in the administration of justice had been issued in and for the said districts respectively—it was declared and enacted “that the authority under which the said Courts and commissions had been erected, holden and issued, and also all matters and things done by or by virtue of the same, are so far as relates to the authority under which the same have been so erected, holden, issued and done good and valid to all intents and purposes whatsoever, and that the provisions of all the acts of the Legislature of this Province respecting the said Courts and commissions, or any of them, are hereby declared to extend and be enforced (except as hereafter mentioned) in each and every the said districts respectively.”

This enactment, so far as it relates to the authority under which commissions of the peace have been issued and the Courts of General Quarter Sessions of the Peace have been held, was embodied in the Consolidated Statutes for Upper Canada chapter 17, section 1, and in the

Revised Statutes of Ontario chapter 44, section 2, and no doubt is the authority under which the Courts of General Session of the Peace are now held in Ontario.

It will be observed that this enactment did not create the Courts nor even define their jurisdiction. It simply gave the sanction of the Legislature to the Courts and to the authority under which they were held, and did not indicate what that authority was.

I think, however, there can be little doubt but that the first commissions of the peace were issued in what is now Ontario in consequence of the introduction of the English criminal law, and as a part of that system.

I have not found any decision to that effect, but it seems the reasonable conclusion from the ascertained circumstances, and it is the view adopted by the writer of an article in the CANADA LAW JOURNAL of February, 1871, on the Jurisdiction of the Courts of General Sessions of the Peace in case of perjury; in which article the question of the origin and jurisdiction of these Courts is considered and dealt with so fully as really to leave but little to be said on the subject.

It is almost unnecessary to say that the criminal law of England was introduced by royal proclamation into the then Province of Quebec in 1763, a few months after the cession of that Province to Great Britain under the Treaty of Paris, and that on the extension of the limits of that Province so as to include all the present Province of Ontario, by the Imperial Act, 14 Geo. III. chapter 83, it was by the 11th section of that Act, after praising the certainty and lenity of the criminal law of England and the benefits and advantages resulting from the use of it, which had been sensibly felt by the inhabitants from an experience of nine years, during which it had been uniformly administered, enacted that the same should

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continue to be administered and should be observed as law in the Province of Quebec, as well in the description and quality of the offence as in the method of prosecution and trial; and that by the Provincial Act 40 George III. chapter 1, passed in July, 1800, after reciting the Imperial Act just referred to, it was enacted that the criminal law of England, as it stood on the 17th September, 1792 (being the date of the meeting of the first Provincial Parliament), should be and was declared to be the criminal law of the Province.

I think, then, it may be fairly assumed that the Courts of General Quarter Sessions of the Peace in the Province of Upper Canada possessed whatever jurisdiction the same Courts had in England on the 17th September, 1792.

As the County of Lincoln was settled early in the history of this country, the first Parliament of the Province being held within its limits, I was in hopes of finding some old commissions of the peace which might throw light on the mode in which they were originally issued. The earliest in date that I have been able to find, however, was issued in 1817. It appears to follow closely the form given in Archbold's Practice of the Quarter Sessions of the Peace as used in England, even retaining among the offences to be inquired into and punished by the justices appointed by it, "enchantments, sorceries, arts magic." The same words are included in the commissions of 1823 and 1828, but omitted in that of 1833, and all subsequent thereto. Of course they had no effect, all prosecutions for these offences, except for pretending to practise witchcraft, having been abolished by 9 George II. chap. 5. Their retention only affords another instance of forms surviving the object for which they were created.

The jurisdiction of the Courts of Quarter Sessions in England has been so reduced and limited by the English statute 5 & 6

Vict. cap. 33, passed 30th June, 1842 (which has never been adopted in this country), that the English decisions since that time are of no assistance to us but are rather calculated to mislead, and but little help can be obtained from modern treatises which are of course written with a view to the existing practice in England. A very clear and succinct statement of the jurisdiction of these Courts under the commission (as distinguished from jurisdiction under subsequent statutes) will, however, be found in Archbold's Practice, already alluded to at the commencement of the work (to which I refer my readers), and of which I will merely give a brief outline and the results.

The Courts of General Quarter Sessions were established by the Act 34 Ed. III. cap. 1, by which it was enacted that in every county in England should be assigned for the keeping of the peace one lord and with him three or four more of the most worthy in the county with some learned in the law, and that they should have power to restrain the offenders, rioters and all other barrators; and to pursue, arrest, take and chastise them according to their trespass or offence, and to cause them to be imprisoned and duly punished according to the law and custom of the realm; and also to hear and determine at the king's suit all manner of felonies and trespasses done in the same county, according to the laws and customs aforesaid.

In the commissions issued in pursuance of the statute the language of the statute is amplified a good deal, but the words "all and all manner of felonies and trespasses" (or trespassings, as I see in the later commissions in this Province) are always used, and the jurisdiction of the Court is governed by the construction put on these words.

What is the proper construction was in former times a matter much disputed, and

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during these times it was settled that neither perjury at common law nor forgery at common law was within the jurisdiction of the Court; and this was recognized and affirmed by Lord Kenyon in the case of *Rex v. Higgins*, 2 East 5; and although he admitted he did not know the reason for the decisions, he considered them so well established that he would not interfere with them. Subject to those two exceptions, Mr. Archbold says that in modern times the general opinion of the profession is that the Court of Quarter Sessions has jurisdiction by virtue of the commission of all felonies whatsoever, murder included, though not specially named, and of all indictable misdemeanours, whether created before or after the date of the commission. As to the word "trespasses," he says the word used when the commissions were in Latin was "transgressionēs," which was a word of very general meaning, including all the inferior offences under felony, and also those injuries for which the modern action of trespass lies. It was usually rendered into law French by the word "trespas," and that is the word used in the original French of the statute 34 Edward III. chap. 1, and it is there rendered into English by the word "trespasses." It is said that when a statute creates a new offence, and directs it to be prosecuted before a Court of Oyer and Terminer or general gaol delivery, without mentioning the General or Quarter Sessions, that is deemed to be an implied exclusion of the jurisdiction of the Sessions with respect to that particular offence (*Rex v. Rispaill*, 1 Wm. Bl. 368; 3 Burr. 1320).

Where, however, a statute required that the offenders against it should be carried before a justice of the peace, and by him committed to the county gaol there to remain until the next Court of Oyer and Terminer, great session or gaol delivery, the Court held that as the offence was a

misdemeanour only, and the defendant might be prosecuted for it without being apprehended or in custody, the clause in the Act did not prevent the indictment being preferred at the Sessions (*Rex v. Cook*, 4 M. & S. 71).

It would seem from this latter case that the Sessions would only be barred jurisdiction where there was an express direction that the offence should be prosecuted before the Court of Oyer and Terminer or general gaol delivery.

Although Lord Kenyon, as I have already mentioned, in recognizing the fact that perjury and forgery at common law were exceptions to the class of offences which, being violations of the law of the land, have a tendency as it is said to the breach of the peace and are therefore cognizable by the Sessions, uses the expression, "why exceptions I know not," it seems clear that the reason why it was held that the Sessions had not jurisdiction over them was that it was considered these offences had not a direct and immediate tendency to cause such breaches of the peace as some other offences, which for that reason had been held to be indictable at the Sessions. In 2 Hawkins' Pleas of the Crown, book 2, chap. 8, sec. 64, it is said: "Yet it hath of late been settled that justices of the peace have no jurisdiction over forgery and perjury at the common law, the principal reason of which resolution, as I apprehend, was that inasmuch as the chief end of the institution of the office of these justices was for the preservation of the peace against personal wrongs and open violence; and the word 'trespass' in its most proper and natural sense is taken for such kind of injuries, it shall be understood in that sense only in the said statute and commission, or at the most to extend to such other offences only as have a direct and immediate tendency to create such breaches of the peace as libels and such like, which on this

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account have been judged indictable before justices of the peace."

This passage is quoted by Mr. Justice Wightman in his judgment in *Ex parte Henry Bartlett*, reported in 7 Jurist 649, decided in 1843, where the question of the power of a justice to commit for trial on a charge of forgery was discussed at considerable length.

This reasoning seems to be adopted and approved of by Chief Justice Wilson in the case of *The Queen v. McDonald*, 31 U. C. R. 339, when he says perjury and forgery not being attended with a breach of the peace the Courts of Quarter Sessions cannot try them.

Assuming then that the Court of Quarter Sessions in Upper Canada had the same jurisdiction as these Courts in England, and consequently jurisdiction over all cases of felony and misdemeanour except perjury and forgery, and such new offences, as by the Act creating them, were directed to be tried at the Courts of Oyer and Terminer and general gaol delivery; it remains to consider the changes effected by Canadian legislation and the decisions of our own Courts.

The statute 7 William IV., chapter 4, abolished the distinction between grand and petit larceny, and enabled the Sessions to try all cases of simple larceny (under certain restrictions when they were not presided over by a barrister). This statute seems to follow substantially the English Act 7 & 8 George IV. chapter 29, sections 2 & 3, although in the English Act the Court of Quarter Sessions is not mentioned, but every Court whose power as to the trial of larceny before was limited to petty larceny was given the power to try every case of larceny, the punishment of which could not exceed the punishment therein mentioned for simple larceny.

It is said in Dickenson's Guide to the Quarter Sessions that in England prior to this Act the Courts of Quarter Sessions only professed to try petty larcencies.

The various enactments in force as to the Sessions were consolidated in chapter 17 of the Consolidated Statutes for Upper Canada, and most of those are now in chapter 44 of Revised Statutes of Ontario.

No definition or limitation of the jurisdiction of the Court is to be found in either of these statutes, although in the Consolidated Statutes, chapter 17, section 3, is to be found sec. 5 of 7 William IV. chap. 4, declaring that it shall not be necessary for any Court of Quarter Sessions to deliver the gaol of all prisoners who may be confined upon charges of simple larceny, but the Court may leave any such cases to be tried at the next Court of Oyer and Terminer, if by reason of the difficulty or importance of the case, or for any other cause it appears to them proper to do so.

In the Dominion Statutes, passed in 1869, 32 & 33 Vict., there are several important enactments affecting the jurisdiction of the Sessions.

They are 32 & 33 Vict. cap. 29. sec. 12, by which it is enacted that no Court of General or Quarter Sessions or Recorder's Court nor any Court but a Superior Court having criminal jurisdiction shall have power to try any treason or any felony punishable with death or any libel.

This is, except as to the prohibition against libel, a re-enactment of 24 Vict. cap. 14 in substance.

Mr. Taschereau in his book on the Criminal Acts has given a list of the offences in respect of which the Sessions have not jurisdiction, in which he has included administering poison or wounding with intent to murder, and carnally knowing a girl under ten years of age. In both cases the death penalty has been abolished since the publication of his book, and I presume the offences are now within the jurisdiction of the Court.

Then 32 & 33 Vict. cap. 20 sec. 48 by which it is enacted that neither the justices of the peace, acting in and for any district,

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county, division, city or place, nor any judge of the sessions of the peace, nor the recorder of any city shall at any session of the peace try any person for any offence under the 27th, 28th and 29th sections of that Act, that is for causing injuries by the explosion of gunpowder or other explosive substance or any corrosive fluid to persons or buildings, ships or vessels, and 32 & 33 Vict. cap. 21. sec. 92 by which it is enacted that no misdemeanour against any of the sixteen last preceding sections of that Act shall be prosecuted or tried at any Court of General Quarter Sessions of the Peace; these sixteen sections all relate to frauds by agents, bankers or factors.

Chief Justice Wilson in the case of *The Queen v. McDonald*, 31 U. C. R., at page 339, refers to the three statutes which I have just mentioned, and says: "The exceptions contained in the last three named statutes, and the excepted cases of forgery and perjury, define as nearly as may be what the general jurisdiction of the Sessions of the Peace is: the unexcepted offences they may try."

This judgment was pronounced in 1871. Since then the Dominion Act, 37 Vict. cap. 9, was passed in 1874. By section 118 of this it is enacted that no indictment for bribery or undue influence, personation or other corrupt practices shall be triable before any Court of Quarter or General Sessions of the Peace.

This Act refers to elections of members of the House of Commons, but it is suggested by Mr. Justice Taschereau that perhaps the words of the section I have quoted are wide enough to extend to elections of the Local Legislature and to municipal elections.

I do not know of any other provisions limiting the jurisdiction of the Sessions. It is quite possible that some have escaped my observation as the little time at my disposal has not allowed me to make as close and thorough an examination of the

statutes as I could have wished. I did not, however, expect to make this paper exhaustive of the subject. In any case which may come up for trial of an unusual character or under any special statute the provisions of the Act creating or defining the offence will always have to be carefully examined to ascertain what provisions, if any, have been made as to the mode of trial.

In addition to the offences I have named, Mr. Taschereau suggests that counterfeiting coin is declared to be treason by different statutes, and consequently is not triable at the Sessions. No doubt counterfeiting the king's money in former times was treason, but under the Canadian Statutes it is expressly declared to be felony; the form of indictment given in the Criminal Procedure Act uses the word feloniously, and so do the forms I find in the books on criminal pleading. I doubt the offence now being punishable as treason.

Mr. Taschereau also suggests that subornation of perjury is by common law not within the jurisdiction of the Sessions and refers to Dickenson's Quarter Sessions in support of his view. This authority sustains him, but the cases referred to in Dickenson do not seem directly in point. The reason, however, for excluding perjury seems equally forcible for excluding subornation of perjury.

I have more than once referred to the case of *The Queen v. Macdonald*, 31 U. C. R. 337, in which it was laid down that the Sessions had no jurisdiction in cases of either forgery or perjury. This case follows, on the question of forgery, the decision of Chief Justice Robinson in *The Queen v. Dunlop*, 15 U. C. R. 118, and is supported, on the question of perjury, by the subsequent decision of *The Queen v. Currie*, 31 U. C. R. 582.

In none of these cases is the distinction between forgery and perjury at common

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law and the same offences by statute adverted to, nor does it appear what was the nature of the offence in these cases in this particular. In the English authorities I have referred to, the jurisdiction of the Sessions is denied in cases at common law, and it is admitted that the Sessions had jurisdiction in cases of perjury at all events under the statute 5 Eliz. chap. 9 (which relates to perjury by witnesses in Court), by virtue of the words of that statute. In the article in the *LAW JOURNAL* of February, 1871, to which I have already adverted, the view is sustained, that the Sessions still have jurisdiction in cases of perjury by witnesses in Court, and a distinction is taken between the language of our statute 32 & 33 Vict. cap. 23, s. 6, and the English Act, 14 & 15 Vict. cap. 100, s. 19, from which our Act is taken, as indicating that in this country the jurisdiction over such cases is not confined to the assizes only, as in England. The writer of that article, however, suggests that in view of the directions given by the statute of Edward to the Sessions in cases of difficulty, not to give judgment unless in the presence of a justice of one or the other Bench, or the justice assigned to hold the assizes, it is not probable that the justices in Sessions will take upon themselves to decide such cases, but will leave them over to be tried by the judge holding the assizes.

Since the decisions I have cited from 31 U. C. R. I think it still more likely that the course he suggests will be adopted.

I had thought of saying something on the jurisdiction of the Sessions in matters of appeal from magistrates' convictions, but this paper has been drawn out longer than I expected, and I find that all I could say on that subject can readily be found from the authorities in *Robinson & Joseph's Digest*.

I will conclude by saying that whatever may be the difficulties in reconciling the

opinions expressed at different times on the subject, a safe guide to the present jurisdiction of the Sessions may be found in the words I have quoted from the judgment of Chief Justice Wilson in *The Queen v. Macdonald*, 31 U. C. R. 351, supplemented, of course, by whatever limitations may have been made by subsequent statutes.

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OBLIGATION OF LANDLORD TO REPAIR UNHEALTHY PREMISES.

THE questions whether or not a landlord must not let unhealthy premises; and whether or not, after having let them, he must keep such premises in a healthy condition and repairs are questions that have not been settled. The adjudications are conflicting and do not advance a principle or rule by which this subject can be governed. Some courts place the non-liability of the tenant for rent, and hence the obligation of the landlord to repair, upon the ground of fraud; others on the ground of the implied covenant to repair and keep the premises tenantable, while others deny the liability of the landlord to repair unhealthy premises unless bound to do so by writing. Stripped of the juridical reasoning exhibited in the adjudications, the proposition that a landlord must not rent unhealthy tenements, and must not, after notice, permit his tenement to become unhealthy for want of necessary repairs, is in harmony with justice, reason, humanity and the interests of government, and should be the universal rule of law. Between the landlord and the tenant, the contract is for tenantable premises, and premises cannot be and are not tenantable if they are or become unhealthy. The tenant rents the place to live in. This is the purpose and object of the contract. The landlord and tenant

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both know this, and deal with each other for this object and purpose. If the premises at the time of renting are not healthy they are not fit to live in, and hence do not comply with the contract. If, after rented, they become unhealthy for want of repairs, they then become unfit to continue to live in, and hence unless made healthy the contract is not complied with.

The Conflict of Decisions.—The following cases¹ hold that the unhealthy condition of the premises at the time of renting, or becoming so during occupancy, is a constructive eviction and is ground to be released from the payment of rent, and hence assert the affirmative of the first proposition that the landlord must keep the premises in a healthy condition. On the other hand the subsequent cases² assert the contrary, and within some instances an incidental limitation.

Looking at these two different positions, one the opposite of the other, there should be no reason why the tenant is not relieved from the payment of rent when the premises become untenable, or unhealthy for want of repairs, because of the fault or neglect of the landlord. The landlord's liability for personal acts of negligence or fraud should not be mixed with his duty to repair. The liability is separate and distinct.³ The landlord is bound to repair where the law imposes the duty,⁴ and where he has done, or omitted to do any act rendering the de-

mise untenable,⁵ and such a condition certainly exists, when the landlord allows or permits such want of repairs as to make the tenement unhealthy.

Statement of the Law.—It is stated by Wood⁶ that "Where certain defects exist that are likely to injuriously affect the health of the tenant or his family it is the landlord's duty to disclose the facts, and failing to do so he is liable to the tenant for all the damages resulting to the tenant which are the immediate and proximate result of such failure. There is a strong tendency to hold that the tenant is absolved from the lease (or rent) if there are latent defects in the premises or causes not readily discoverable on examination which render the premises unfit for occupancy, of which the landlord knew and did not inform the tenant; but this is not well established and is contrary to the weight of authority."

It is stated by Parsons⁷ that a landlord is under no implied obligation to repair and that the uninhabitableness of a house is not a defence to an action for rent. But if the landlord does a positive wrong such as an erroneous or fraudulent misdescription of the premises or if it is made uninhabitable by the landlord's own acts the tenant can leave the premises. It is stated by Story,⁸ that the landlord impliedly covenants that the premises are fit for beneficial occupation, as where the wall of a privy gave way and overflowed the kitchen with filth, and impregnated the water in the pump, and the landlord did not remove or repair it after notice, he cannot recover rent,⁹ or where a furnished house was let and the beds were infested with bugs to such an extent as to render them unfit for occupation, the landlord cannot recover rent.¹⁰ But this doctrine has been overruled in England

¹Smith v. Marrable, 1 M. & W. 5; Edwards v. Hetherington, 7 D. & R. 117; Collins v. Barrow, 1 Moo. & R. 112; Salisbury v. Marshall, 4 C. & P. 65; Cowie v. Goodwin, 9 C. & P. 378; Gilhooly v. Washington, 4 N. Y. 217; Gallagher v. Waring, 9 Wend. 20; Van Bracklin v. Fonda, 12 Johns. 468; Gray v. Cox, 4 B. & C. 108; Laing v. Fidgeon, 6 Taunt. 108; Howard v. Holy, 23 Wend. 350; Pickering v. Dawson, 4 Taunt. 779; Jones v. Bright, 5 Bing. 533.

²Smith L. & T. 262; Woodfall L. & T. 493; Taylor L. & T. § 381; 1 Pars. Cont. 589; 1 Wash. R. Prop. 473; Sutton v. Temple, 12 M. & H. 52; Hart v. Windsor, 12 M. & W. 68; Chappell v. Gregory, 34 Beav. 250; Carstairs v. Taylor, L. R. 6 Exch. 217; Cleves v. Willoughby, 7 Hill, 83; Royce v. Guggenheim, 106 Mass. 202; Elliott v. Aiken, 45 N. H. 36; Alston v. Grant, 3 El. & Bl. 127; Leavitt v. Fletcher, 10 Allen, 121; Brewster v. DeFrancey, 33 Cala. 341; Doupe v. Genine, 45 N. Y. 119; 2 Story Cont. 422.

³Eaten v. Winnie, 20 Mich. 156; R. R. Co. v. Ogier, 35 Pa. St. 72; Garden v. R. Co. 40 Barb. 550; Ernst v. R. Co. 35 N. Y. 28.

⁴McAlpine v. Powell, 1 Abb. 427.

⁵Priest v. Nicholas, 116 Mass. 401; Norcross v. Thoms, 51 Me. 503; Kirby v. Ass'n, 14 Gray, 249; Gray v. Gas Co. 114 Mass. 149; Alger v. Kennedy, 49 Vt. 109.

⁶Landlord & Tenant, 624; citing Minor v. Sharon, 112 Mass. 477; Wilson v. Finch, Hutton L. R. 2 Exch. Div. 236; Eakin v. Brown, 1 E. D. Smith, 36; Wallace v. Lent, 1 Daly, 481; Staples v. Anderson, 1 Robt. 327; Meeks v. Bawerman, 1 Daly, 100.

⁷3 Pars. Cont. 501.

⁸2 Story Cont. 422.

⁹Citing Cowie v. Goodwin, 9 C. & P. 378.

¹⁰Citing Smith v. Marrable, 11 M. & W. 5.

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and denied in America and the rule laid down that the fact that the premises are unwholesome will not entitle the tenant to quit them (1) where he knew or could have known the fact and (2) where the landlord has not been guilty of fraud or misrepresentation and is in no default.¹¹

In substance these authors hold that a landlord is not obliged to repair unhealthy premises made so by want of repairs, and is not obliged to disclose the fact that the premises are unhealthy if the tenant knew or could have known it.

Analysis of the Cases.—In *O'Brien v. Capwell*¹² the Court said that the "law is well settled that where there is no fraud or false representation or deceit, no express warranty or covenant to repair, there is no implied obligation or covenant that the premises are suitable or fit for occupation or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use, or that they will continue so." In *Robbins v. Mount*¹³ the Court said if there is no express agreement, there is no obligation on the part of the landlord that the premises shall continue fit for the purposes for which they were demised, or that they are in a tenantable condition, or that they will continue so. The same Court went further and held that there was no obligation to repair unless there is an express agreement or a fraudulent or mistaken misdescription.¹⁴ This has been adopted in other cases.¹⁵ *Scott v. Simons*¹⁶ was an action for damages for injuries caused by the negligence of the landlord improperly constructing a drain and suffering it to remain defective whereby the tenant's goods were damaged by overflow of water for which cause the tenant left the premises. The Court held that the landlord was not liable, because he was only liable to repair the drain under an express covenant, the obligation to repair not being implied. In *Westlake v. De-*

*Graw*¹⁷ the premises were infected with sickening and noxious smells arising from dead rats. The landlord knew of the smells but did not disclose it to the tenant. The smell produced sickness. The landlord was informed and sent a carpenter to remove the cause, but the tenant abandoned the house before the carpenter got to work. The Court held the tenant liable for the rent. The Court must have placed the liability on the speedy removal of the cause by the carpenter, because it was certainly a fraudulent concealment of the facts for the landlord not to disclose the infection which he knew. The question of an implied covenant to repair did not arise. If this is the ground, it is contrary to *Whitehead v. Clifford*,¹⁸ *Wallace v. Lent*,¹⁹ and *Sutton v. Temple*.²⁰ The Court in *Wallace v. Lent* held that it was a good defence to an action for rent that the landlord did not tell the tenant of a stench in the house which he knew existed, and which subsequently caused the tenant's sickness; stating that "If the landlord knew of any cause which renders the house unhealthy he must disclose it. If he does not it is procuring an innocent person to rent a house which he knows is unfit." In *Sutton v. Temple* the Court announced the same doctrine, but held the tenant liable because the landlord did not know of the poisonous substance or smell.

In *Weeks v. Bawerman*,²¹ the defence to the suit for rent was that the premises had been occupied as a brothel, which fact the landlord did not disclose to the tenant, and in consequence the tenant was insulted and annoyed by lewd persons calling at all hours of the night to such an extent that he had to leave and could not quietly and peaceably occupy the premises; the Court held that this was no defence; that the landlord was not bound to disclose the uses to which the premises had been previously put, and that there was no implied warranty that the premises were suitable for the purposes rented. "*Caveat emptor*" applies to this case, and to all transfers of property, and purchasers take the risk of its quality and condition

¹¹Citing *Westlake v. De Graw*, 25 Wend. 669; *Foster v. Peyser*, 9 Cush. 242; *Dutton v. Gerrish*, 9 Cush. 89.

¹²59 Barb. 504.

¹³4 Rob. (N. Y.) 553.

¹⁴*Cleves v. Willoughby*, 7 Hill, 83.

¹⁵*Howard v. Doolittle*, 3 Duer. 464; *Mumford v. Brown*, 6 Cowen 475; see *Chitt. Cont.* 383; *Taylor L. & T.* 166.

¹⁶54 N. H. 429.

¹⁷25 Wend., 669.

¹⁸5 Taunt., 503.

¹⁹1 Daly, 482.

²⁰12 M. & W., 52.

²¹1 Daly, 100.

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unless protected by an express agreement; the only exception being sales of provisions for domestic use, as in *Vani Bracklin v. Fonda*,²² and a demise of ready furnished lodgings, as in *Smith v. Mar-
rable*.²³

In *Staples v. Anderson*,²⁴ and *Carnfout v. Fowke*,²⁵ it was a good defence to an action for rent that the landlord knew that the house had formerly been occupied as a brothel and concealed that fact from the tenant, who was compelled to remove in consequence of the annoyance. The Court held this to be a fraudulent concealment.

In *Minor v. Sharon*,²⁶ the landlord knew that the house was infected with the small-pox so as to be unfit for occupation, and to such an extent as to endanger health, and concealed this fact from the tenant. The tenant engaged the house and occupied it. He and his family took sick by reason of the infection. He was ignorant of the dangerous condition of the house, and no act on his part contributed to the sickness. The Court held the landlord guilty of actionable negligence and liable for all the injury the tenant sustained; stating, that as the landlord knew the house was infected, it was his duty to inform the tenant to refrain from renting it until it was properly disinfected, and as he did not do this, he was guilty of negligence. Although this case is cited to sustain the proposition as to the want of repairs, in fact it rests on the doctrine of negligence, which is sustained in the following cases.²⁷

In some English cases,²⁸ and especially *Izon v. Garton*,²⁹ the tenant was released from the rent on the ground, first, that the landlord erred or fraudulently misdescribed the premises; or, secondly, that the premises were found or became uninhabitable by the wrongful act or default

of the landlord himself. This conclusion was reached and sustained in *Hart v. Windsor*,³⁰ after a review of all the prior cases, and was adopted and followed in *Surplice v. Farnsworth*,³¹ and in New York, Maine and Massachusetts.³²

The case of *Dutton v. Garrish*,³³ asserts the same doctrine, but this was a case on a written lease, and the Court would not admit parol testimony to show that the landlord warranted it fit for occupation and to continue so, nor draw an implied warranty from a written lease. So in a late case in New York,³⁴ the tenant moved out of a house which had been declared by the board of health to be unhealthy on account of the bad condition of the plumbing, notice to that effect having been given to the landlord. The landlord brought suit for his rent, and the defence claimed that there had been a constructive eviction by reason of the unhealthy condition of the premises. The Court held that if the health of the tenant or his family is imperilled by the neglect of the landlord to make necessary repairs in the plumbing of the house the tenant is in effect deprived of the beneficial enjoyment of the premises, and may therefore move out without paying rent. This case asserts the proposition in conformity with a number of cases, and with the proposition set forth in the beginning, that if the premises become unhealthy because of the landlord's neglect to repair, after notice, it is a constructive eviction of the tenant, and he is not liable for the rent.—*Central Law Journal*.

²²12 Johns., 468.

²³1 Carr. & M., 479. See *Cleves v. Willoughby*, 7 Hill, 83.

²⁴3 Robt., N. Y. 327.

²⁵6 Mees. & W., 359.

²⁶112 Mass., 477.

²⁷*Sweeney v. R. Co.*, 10 Allen, 368; *Carleton v. Iron & Steel Co.*, 99 Mass, 216; *French v. Vining*, 102 Mass. 132.

²⁸*Cowie v. Goodwin*, 9 C. & P. 378; *Salisbury v. Marshall*, 4 C. & P. 65; *Collins v. Barrow*, 1 Mood & Rob. 112; *Shepherd v. Pybus*, 3 M. & G. 867; *Edwards v. Heatherington*, 6 D. & R. 117.

²⁹5 Bing. (N. C.), 501.

³⁰12 M. & W., 68.

³¹7 M. & G., 576.

³²*Foster v. Peyser*, 9 Cush. 242; *Libbey v. Talford*, 48 Me. 316; *Post v. Vetler*, 2 E. D. S. 248; *Ins. Co. v. Scott*, 2 Hilton, 550; *Gardner v. Keteltas*, 3 Hill, 530.

³³9 Cush., 89.

³⁴Not reported.

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NOTES OF CANADIAN CASES.

[Sup. Ct.]

NOTES OF CANADIAN CASES.PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.**SUPREME COURT.**

Ontario.]

SYNOD OF HURON V. WRIGHT.*Member of Synod—Trust, construction of—Vested rights—Commutation fund.*

The sum received for commutation under the Clergy Reserve Act was paid to the Church Society, upon trust to pay for the commuting clergy their stipend for life and when such payment should cease then "for the support and maintenance of the clergy of the Diocese of Huron in such manner as should from time to time, be declared by any by-law or by-laws of the Synod to be from time to time passed for that purpose." In 1880 a by-law was passed providing that out of the surplus of the commutation fund, clergymen of eight years and upwards active service should receive each \$700 with a provision for increase in certain events. In 1873 the plaintiff became entitled under this by-law and in 1876 the Synod (the succession of the Church Society) repealed all previous by-laws respecting the fund and made a different appropriation of it,

Held, affirming the judgment of the Court below (FOURNIER and HENRY, JJ., dissenting), that under the terms of the trusts, the trustees were free at all times to repeal previous by-laws respecting the funds in question and make a different appropriation of it and that the plaintiff had no contract or vested right which entitled him to object.

Appeal dismissed with costs.

McCarthy, Q.C., and *Harding*, for appellant.*S. H. Blake*, Q.C., for respondents.

Manitoba]

McKENZIE V. CHAMPION.*Agent—Sale by—Duty of agent—Commission—Mis-trial.*

The plaintiffs, real estate brokers at Winnipeg, were instructed generally by the defendants to sell certain lands of theirs at a certain price and terms of payment. The plaintiffs did make a sale of these lands and signed a receipt for \$5,000 cash paid on account of purchase money which was paid to defendants. The purchasers subsequently refused to carry out the purchase and from the absence of writing signed by them they could not be compelled to do so. The plaintiffs then brought their action for commission upon the entire purchase money as if the contract had been carried out by the purchasers. The case came on for trial before a jury who followed the charge of the Chief Justice and found a verdict in favour of the plaintiffs for the full amount of their claim, viz., two and one-half per cent. commission upon the entire purchase money of the lands. The jury were not asked to pronounce upon the nature of the terms upon which the plaintiffs were employed. In review before the full Court a new trial was granted if plaintiffs were not willing to reduce verdict to commission of two and one half per cent. on the \$5,000 paid,) on the ground that it was the duty of the plaintiffs to bind the purchasers as well as the defendants.

On appeal to the Supreme Court of Canada.

Held (STRONG, J., dissenting), affirming the judgment of the Court below, that there had been a mis-trial.

Appeal dismissed with costs.

Macmahon, Q.C., for appellants.*McCarthy*, Q.C., for respondents.

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NOTES OF CANADIAN CASES.

[Sup. Ct.]

New Brunswick.]

EX PARTE J. D. LEWIN.

St. John Assessment Act of 1882—Assessment of capital and joint stock of bank—Whether real and personal property belonging to may be assessed?

By "The St. John Assessment Act of 1882," sec. 25, all rates and taxes on the city are to be raised by an equal rate upon the real estate therein, and on the personal estate and income of the inhabitants and of persons declared to be inhabitants for the purpose of taxation, and upon the capital stock, income or other thing of joint stock companies or corporations, and shall be levied as follows: viz., by a poll tax of one dollar on all the male inhabitants of twenty-one years of age, and the residue upon the rateable property, real and personal, and rateable income and joint stock according to its true and real value provided that joint stock shall not be rated above the par value thereof."

By section 28, joint stock companies and corporations are to be assessed in like manner as individuals and the president or manager of such joint stock company, etc., is to be deemed to be the owner of the real and personal estate, capital stock and assets of such company, and shall be dealt accordingly.

By the Act incorporating the Bank of New Brunswick its capital or stock was fixed at one million dollars. In 1882, the appellant, President of the Bank, was assessed under the 28th section of the Assessment Act on real estate valued at \$42,200 and personal estate of \$1,057,800, making together \$1,100,000. The value of the capital stock of the Bank was at par.

Held (reversing the judgment of the Court below), that all the property real, and personal, of the New Brunswick Bank formed its assets and should be assessed as capital stock, and only at the par value thereof.

Appeal allowed with costs.

Weldon, Q.C., for appellants.

Dr. Tuck, Q.C., and *Millidge* for respondents.

Prince Edward Island.]

THE QUEEN V. BANK OF NOVA SCOTIA.

Priority of the Crown as simple contract creditor—Acceptance of dividends by Crown not waiver.

The Bank of Prince Edward Island became insolvent and a winding up order was made on the nineteenth of June 1882. At the time of its insolvency the bank was indebted to Her Majesty in the sum of \$93,494.20, being part of the public moneys of Canada which had been deposited by several departments of the Government to the credit of the Receiver General.

The first claim filed by the Minister of Finance at the request of the respondents, liquidators of the Bank of Prince Edward Island, did not specially notify the liquidators that her Majesty would insist upon the privilege of being paid in full. Two dividends of 15 per cent. each were afterwards paid and on the 28th of February, 1884, there was a balance due of \$65,426.95. On that day the respondents were notified that her Majesty intended to insist upon her prerogative right to be paid in full.

At the time the liquidators had in their hands a sum sufficient to pay in full her Majesty's claim.

The following objection to her Majesty's claim was allowed by the Supreme Court of Prince Edward Island, viz.: That her Majesty the Queen, represented by the Minister of Finance and the Receiver General, has no prerogative or other right to receive from the liquidators of the Bank of Prince Edward Island the whole amount due to her Majesty, as claimed by the proof thereof, and has only a right to receive dividends as an ordinary creditor of the above banking company.

On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that the right of the Crown claiming as a simple contract creditor to priority over other creditors of equal degree cannot be disputed.

That this prerogative privilege belongs to the Crown as representing the Dominion of Canada when claiming as a creditor of a provincial corporation in a provincial Court.

That the Crown can enforce this prerogative

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NOTES OF CANADIAN CASES.

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right in proceedings in insolvency under 47 Vict. ch. 23.

That the Crown by its acceptance of two dividends had not waived its right to be preferred to other simple contract creditors.

Appeal allowed with costs.

Burbidge, Q.C., for appellant.

Hodgson, Q.C., and *Fitzgerald, Q.C.*, for respondents.

Prince Edward Island.]

FITZGERALD V. MCKINLAY.

Canada Temperance Act 1878—Sec. 107—Appropriation of fines—31 Vict. ch. 1.—Applicable to Province of Prince Edward Island—Sec. 7. sub-sec. 22.—Construction of.

McK (the respondent) prosecuted one B. before F. (the appellant) as stipendiary magistrate for a breach of the 100th section of the Canada Temperance Act 1878. B. was convicted and fined \$100 and the fine was paid F. as stipendiary magistrate. McK thereupon applied to the Supreme Court of Prince Edward Island and obtained a rule *nisi* for a mandamus to compel F. to pay over to him one half of the said sum of \$100, and after argument the rule was made absolute. On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that whereas a mode of recovering penalties imposed by the Canada Temperance Act is given by section 107, viz.: under the Summary Convictions Act, 32-33 Vict. ch. 31, and said Act makes no appropriation of the said penalties, the same belong to the Crown.

That the Interpretation Act, 31 Vict. ch. 1 (D), is in force in Prince Edward Island, but that sub-sec. 22 of sec. 7 only applies to fines imposed for the infraction of an act which in itself appoints no specific mode for their recovery.

Appeal allowed with costs.

Davies, Q.C., for appellant.

Peters, for respondent.

Prince Edward Island.]

INGS V. BANK OF PRINCE EDWARD ISLAND.

Set-off by contributory in an action on a promissory note by liquidators of a bank—45 Vict. ch. 23. sec. 76.—Construction of.

In May, 1883, the Bank of Prince Edward Island discounted the appellant's note for \$6,000, and on the fifth of May, 1882, appellant purchased in good faith and for value a draft of the Prince Edward Island bank for \$5,685.11. The Canada Winding-up Act was passed on the 17th May, 1882, and on the 19th June, 1882, a winding-up order was made on the Prince Edward Island Bank. The appellant was a shareholder and was settled on the contributory list. Appellant's note fell due on the 3rd June, 1882, and he set up the above draft of \$5,685.11 of which he was then the holder and endorsee, as a set-off, and paid the difference in cash.

The bank refused to allow this set-off, and subsequently brought suit in the Supreme Court of Prince Edward Island on the note, to which the appellant pleaded the cash payment and the above draft as set off. A verdict was found for the respondents. The learned judge having charged the jury that sec. 76 of 45 Vict. ch. 23 was retrospective.

On a motion for a rule *nisi* for a new trial the rule was discharged by the Supreme Court of Prince Edward Island. On appeal to the Supreme Court of Canada.

Held (reversing the judgment of the Court below), that section 76 of 45 Vict. ch. 23 did not apply because the draft was bought before the Act was passed and because by its terms it is confined to cases of set-off by contributories against claims for contribution, and that appellant having purchased *bona fide* and for value the draft in question he was entitled to set it off against the note sued on.

Appeal allowed with costs,

Davies, Q.C., for appellant.

Fitzgerald, Q.C., and *Peters*, for respondents.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

CHANCERY DIVISION.

Ferguson, J.]

[July 6.]

GRAHAME V. BOULTON.

Will, construction of—Conditional gift—Condition becoming impossible—Vesting—Gift over—Time of payment.

A testator bequeathed his chattels and \$1,500 to his widow. His estate he directed to be sold and the \$1,500 to be paid out of the proceeds. After providing for the investment of the estate he proceeded: "The yearly interest accruing from the same to be paid out to my said wife yearly for the term of six years or until my only son shall become twenty-one."

"5. It is my will that the above-mentioned gifts and bequests to my wife shall be given to her in lieu of dower and on the further condition that she will clothe, maintain, and suitably provide for my said son until he shall become twenty-one."

"6. It is further my will that on the coming of age of my said son, my executors shall pay over to him the whole of the principal sum of money remaining in their hands after satisfying the above expenses and legacies."

"7. In case my said son should die before coming of age then the money so remaining as above and to which he would then be entitled shall be paid over to my two eldest brothers."

The son died under twenty-one.

Held, that all the gifts to the widow were upon the condition of maintaining the son; but the condition having become impossible of performance by the son's death the gifts were denuded of the condition.

Held, also that the testator's brothers were not entitled to payment of the capital until the time at which the son would have attained twenty-one, if he had lived; and in the meantime the widow was entitled to the income.

Jeffereys, for the plaintiff.

Meredith, Q.C., and *R. M. Meredith*, for the several defendants.

PRACTICE.

Mr. Dalton.]

[March 18.]

Rose, J.]

[July 4.]

CANADA LIFE ASSURANCE COMPANY V. NUTTALL.

Allowing service out of jurisdiction—Making and breach of contract—Setting aside proceedings—Rule 45 O. J. A.

The defendant was the agent of the plaintiffs in British Columbia and his duty was to remit the balances of premiums received to the plaintiffs' head office at Hamilton. The action was brought to recover sums of money which should have been but were not so remitted by the defendant.

The contract under which the defendant became the plaintiffs' agent was made by correspondence. On the 5th of November, 1884, the plaintiffs wrote to the defendant, naming the amount of the guarantee bond required and stating what expenses they would pay in addition to the commission allowed. On the 29th of November the defendant answered by letter accepting the agency, and that letter closed the correspondence.

Held, that the final assent to the contract made between the plaintiffs and defendant having been given in British Columbia, the contract was not "made or entered into within Ontario" and service of the writ of summons effected on the defendant in British Columbia could therefore not be allowed under Rule 45 (b.) O. J. A.

The defendant's instructions were to remit to Hamilton all balances by the last day of each month and it was admitted that the defendant had always previously remitted by a bank draft from British Columbia.

Held, that the defendant's breach of duty was in not remitting by post, or in the usual way, which would have discharged him, and therefore that the breach of contract did not arise within Ontario and service could not be allowed under Rule 45 (c.)

Quare, per Rose, J.—Whether it was necessary or proper to set aside the writ of summons statement of claim and service, in addition to refusing to allow the service?

J. A. Culham, for the plaintiffs.

Mackelcan, Q.C., for the defendant.

NOTES OF CANADIAN CASES—CORRESPONDENCE.

Prac.]

Rose, J.]

[July 10.]

PURSLEY V. BENNET.

Mitigation of damages — Action for malicious arrest—Pleading and evidence.

In an action for malicious arrest the statement of defence set up that there was a warrant in the hands of a constable for the apprehension of the plaintiff on a charge of misdemeanour, that the plaintiff was avoiding arrest, that the defendant therefore watched him and when he endeavoured to escape detained him until the arrival of the constable and then gave him into custody, and that the defendant did this in the *bona fide* belief that he was justifying in thus aiding the arrest.

Held, that, although these facts did not constitute an answer to the action, yet they could be given in evidence in mitigation of damages, and therefore it was proper that they should appear on the record.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

CORRESPONDENCE.

DISQUALIFICATIONS OF POLICE MAGISTRATES AND JUSTICES OF THE PEACE.

To the Editor of the CANADA LAW JOURNAL:—

SIR,—On looking over the volume of the Statutes of Ontario just issued, there is a chapter (17) entitled an Act respecting Police Magistrates for Counties. These, with 41 Vict. (1878) c. 4, an Act respecting the Magistracy; and also the Revised Statutes of Ontario (1877), c. 72, an Act respecting Police Magistrates, comprise all the statute law of Ontario respecting the appointment, etc., of "the great unpaid," and the stipendiary magistrates.

I was disappointed at not finding a very necessary and wholesome disqualification attached to such offices, viz., that of practising as barristers or attorneys while holding office. There is at present no law in Ontario forbidding that very anomalous

and immoral plurality of official functions. A police magistrate or justice of the peace can, in Ontario, continue to practise as a lawyer within the county or city for which he is appointed and acting as such justice of the peace or stipendiary magistrate.

To my knowledge there is one city in Ontario in which we find such a case existing, and we find a well-paid police magistrate openly practising as a barrister and attorney.

Let us turn to the law of England on this important matter. In the Stipendiary Magistrates Act, 1863, 26 & 27 Vict. c. 97, section 5, we read: "Any person assigned to keep the peace within any city or place under the provisions of this Act, shall, during the continuance of such assignment, execute the duties of a justice of the peace in and for the city and place for which he shall have been so assigned, although he may not have such qualification by estate as is required by law in the case of such persons being justices of the peace for a county; provided that such person be not disqualified by law to act as a justice of the peace for any other cause, or upon any other account, than in respect of estate, and shall sit and act as a justice of the peace within such jurisdiction as aforesaid on all matters where one or more justices are by law now required either alone or together with any other justice or justices of the peace of the city or place wherein his jurisdiction is situate, etc." Now, in the Imperial Act, 34 Vict., 1871, c. 18, we find the cause of disqualification other than estate set out as follows: "No person shall be capable of becoming or being a justice of the peace for any county in England or Wales in which he shall practise and carry on the profession or business of an attorney, solicitor, proctor, etc."

This common, moral-sense principle is further exhibited in a provision found in the before-cited Stipendiary Magistrates' Act, section 6, where the magistrate is required to appoint as his clerk an attorney-at-law, but this clerk is not to be concerned, either by himself or his partner, in any matter before the said magistrate, or arising out of or consequent thereupon in any other court, on pain of dismissal.

In 19 & 20 Vict. c. 48, 1856, Imp., applicable to Scotland only, we read, section 4: "Any writer, attorney, procurator, or solicitor who may be elected to the office of magistrate or dean of guild of any burgh, the magistrates or dean of guild of which are *ex officio* justices of the peace by virtue of their election to such offices, shall, so long as he holds any such office, be entitled to act as a justice of the peace, provided he intimates to the clerk of

CORRESPONDENCE—ANNUAL MEETING OF COUNTY JUDGES.

the peace for the county in which such burgh is situated that he and any partner or partners in business with him cease to practise before any justice of the peace court in such county, so long as he continues to hold such office as aforesaid; and it shall not be lawful for him or them thereafter, and during his continuance in office, so to practise."

Manitoba has wisely copied the English statute law provisions in chapter 7, section 20 of her Consolidated Statutes, 1880, by enacting that "No barrister, attorney or solicitor in any Court whatever, shall be appointed to act as a justice of the peace in or for any county in that Province during the time he continues to act as such." I sincerely trust that the Hon. Mr. Mowat will see fit to prevent the abuse complained of, and disqualify practising attorneys from holding the office of justice of the peace or police magistrate. The same arguments which sufficed to carry the County Justices Amendment Bill, 34 Vict. c. 18, 1871, in the English House of Commons, which I extract from the Hansard, will, I trust, be equally convincing and effective next session in the Legislative Assembly of Ontario.

Sir Roundell Palmer expressed his opinion that it was in reason and principle a good thing that solicitors practising in counties should not, as a rule, be magistrates in those counties, not because it was to be feared that they would abuse that position, but because it was deemed necessary that magistrates should be above suspicion. Mr. Sergeant Sherlock thought it for the interest of the profession itself that its members should not be open to the suspicion of preparing a case upon which they were called upon to adjudicate. Mr. Hinde Palmer suggested that the restriction should extend not only to the counties in which they practised, but to adjoining counties also. Sir Henry Hoare, Mr. Bruce and Sir Lawrence Palk approved of the Bill, only a single member moving an amendment which he afterwards withdrew.

Pardon the length of this letter,

Yours, etc.,

Ottawa.

R. J. WICKSTEED.

ANNUAL MEETING OF COUNTY JUDGES.

The annual meeting of the County Judges of Ontario was held in the Benchers' Convocation Room at Osgoode Hall on Wednesday and Thursday the 24th and 25th days of June last.

There were about twenty judges present; Judge Jones, of Brant, presiding.

Judge Senkler, of Lincoln, read a very interesting paper on the Jurisdiction of the General Quarter Sessions. With the consent of Judge Senkler we print this instructive paper in another column.

Some interesting questions were debated by the judges; amongst others the practice in Surrogate matters; fees in probate matters; what estate should be considered personalty, etc., etc.

It was decided after some discussion that whenever a party to a suit in a County Court case desired to examine his opponent under the O. J. Act, after issue joined that an order of the judge was necessary, as no official was authorized to take such examination in a County Court case without such order.

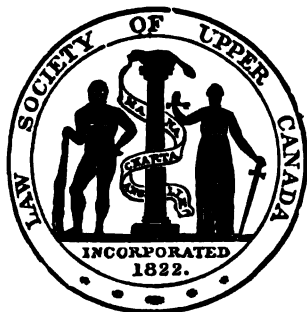
The powers of County Judges and Local Masters in Superior Court cases were considered, and the opinion expressed by the judges was that the sections conferring these special powers should receive the most liberal construction, as the object of the Act of last session was to decentralize.

A committee was appointed to enquire into and report on all questions and matters concerning the administration of justice in the County Courts in view of possible legislation in the near future.

After debating and considering a number of questions of practice and procedure, the meeting, which had led to a very profitable exchange of views among the judges in attendance, adjourned till June, 1886, unless the judges were sooner called together by the chairman.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

During Michaelmas Term the following gentlemen were called to the Bar, namely:—John Alexander MacKintosh, Adam Carruthers, Arthur Burwash, Henry Herbert Collier, James D. S. C. Robertson, John Douglas, James Alexander Hutchison, Joseph Alphonse Valin, James Cæsar Grace, David Thorburn Symons, Dyce Willcocks Saunders, William Torrance Allan, Edmund Weld, Thomas Bulmer Bunting, William Travis Sorley, Isaac Norton Marshall, Frank Russell Waddell, Thomas James Decatur, Alexander George Frederick Lawrence, George Weir, William James Nelson, William David Jones, William Acheson Proudfoot, David F. McArdle; and the following gentlemen were admitted to the Society as Students-at-Law, namely:—Graduates: Frank Ambridge Drake, George Watson Holmes, Arthur Stevenson, Herbert Langell Dunn, John Frederick Dumble, Nicholas Ferrar Davidson, Clement Rowland Hanning, Edward Holton Britton. Matriculants: Alexander Clarke, Henry Augustus Wardell, Herbert Ferdinand Bonzé, Duncan Henry Chisholm, Fergus James Travers, John Thomas Hewitt, Richard Vercoe Clement, James Alexander Haight Campbell, Robert Lazier Elliott, Robert Gordon Smyth. Juniors: George Carnegie Gunn, Herbert William Lawlor, James Arthurs, William Pinkerton, George Davey Heyd, Forbes Begue Geddes, Robert Elliott Lazier, Frederick Forsyth Pardee, William Locklin Billings Lister, Reginald Murray Macdonald, Ernest Edward Arthur Duvernet, Frank Stewart Mearns, Arthur Trollope Wilgress, Stephen Dunbar Lazier, Robert Segsworth, James Henry McGhie.

During Hilary Term, 1885, the following gentlemen were called to the Bar, namely:—Frank Hedley Phippen, Francis R. Powell, Henry John Wickham, John Workman Berryman, Richard Henry

Hubbs, Henry Lawrence Ingles, William Albert Matheson, John Bell Jackson, Norman N. A. McMurchy, Frederick Luther Rogers, John Lawrence Murphy, Thomas Irwin Forbes Hilliard, Hume Blake Elliott, Richard M. C. Toothe, Alexander Campbell Shaw, Joshua Denovan, E. A. Miller, Frederick W. Hill, Duncan Charles Murchison, Thomas Moffat, Manly German, George McLaurin, and the following gentlemen were admitted as Students and Articled Clerks, namely: Graduates, John Henry Cosgrove, Alexander Henderson, Jr.; John Arthur Tanner, Francis Alexander Anglin. Matriculants: Alfred E. Cole, Dioscore J. Hurteau, William Charles Mikel. Juniors: William Henry Moore, George Washington Littlejohn, Arthur St. George Ellis, George Smith McCarter, William Albert Smith, Ernest Napier Ridout Burns, Edmund Sheppard Brown, John Patrick O'Gara and William Walton passed the Articled Clerk's examination.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- | | | |
|----------------------|---|--|
| 1884
and
1885. | { | Arithmetic. |
| | | Euclid, Bb. I., II., and III. |
| | | English Grammar and Composition. |
| | | English History—Queen Anne to George III. |
| | | Modern Geography—North America and Europe. |
| | | Elements of Book-Keeping. |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- | | | |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major. |
| | | Virgil, Æneid, B. V., vv. 1-361. |
| | | Ovid, Fasti, B. I., vv. 1-300. |
| | | Xenophon, Anabasis, B. II. |
| 1885. | { | Homer, Iliad, B. IV. |
| | | Xenophon, Anabasis. B. V. |
| | | Homer, Iliad, B. IV. |
| | | Cicero, Cato Major. |
| | | Virgil, Æneid, B. I., vv. 1-304. |
| | | Ovid, Fasti, B. I., vv. 1-300. |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

LAW SOCIETY OF UPPER CANADA.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar.

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received

his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bench, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

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SEPTEMBER 15, 1885.

No. 16.

DIARY FOR SEPTEMBER.

17. Tues.....First U.C. Parliament met at Niagara, 1792.
20. Sun.....16th Sunday after Trinity. Lord Sydenham,
Governor-General, died, 1841.
24. Thur.....Guy Carleton, Lieut.-Governor, 1776.
27. Sun.....17th Sunday after Trinity.
30. Wed.....Sir Isaac Brock, President, 1811.

TORONTO, SEPTEMBER 15, 1885.

We learn from the case of *Commonwealth v. Perry*, Massachusetts Supreme Court, March, 1885, that a piggery is an indictable nuisance. The judge instructed the jury that the natural odour of one pig might not be a nuisance, but that from 500 such animals might be, and it was for the jury to say whether this was so or not. The Court, on appeal, affirmed the conviction.

IN these days when small-pox is rampant in one of our cities the case of *Gilbert v. Hoffman*, Supreme Court of Iowa, noted in the *Albany Law Journal*, will be of interest. It was there held that a hotel-keeper who, with the knowledge of the prevalence of small-pox in his hotel, keeps it open for business and permits a person to become a guest without informing him of the disease, will be liable for the communication of the disease to the guest, and the latter will not be chargeable with contributory negligence in not making inquiries as to the truth of a rumour that there was small-pox in the house.

THE *Gazette* announces the resignation of his Honor Judge Boyd, and the appointment in his place of the junior judge of the County of York, Mr. Joseph E.

McDougall. Mr. Boyd has earned his retirement by faithful service for twenty-three years. His successor has proved his fitness for the position he now occupies by the ability he has shown in the subordinate position. A sound lawyer, clear-headed, prompt and courteous, the profession will have great satisfaction in appearing before him in the conduct of cases in the County Court of the metropolitan county of this Province.

OUR namesake in England says, "This week her Majesty's judges are engaged in an operation which recalls what happens in a certain children's game when there is a cry of 'general post.' "The illness of one of their number—an event normally imminent—has thrown everyone out. Lord Esher, Master of the Rolls, instead of solving intricate legal problems in the Court of Appeal, is trying prisoners at the Old Bailey; Lord Justice Bowen has turned his hand again to the elements of law at judges' chambers; and Lord Justice Fry's keen aptitude for the niceties of equity is devoted to poor law and the Highway Acts in a Divisional Court." We would recommend the agility of the judges of the English Bench in this old game of "general post" to the attention of some of the ermine-clothed at Osgoode Hall.

THE ingenious audacity which characterizes some cases brought before the Courts is sometimes amusing; an instance of this may be seen in the recent case of *Tottenham v. Swansea Zinc Ore Co.*, 52 L. T. N. S. 738. The defendant company carried on the business of manufacturing zinc and spelter, sulphuric acid and

MORTGAGES AND TRADE FIXTURES—THE FRANCHISE ACT AND THE PROFESSION.

zinc oxide on leasehold premises; and for the purposes of their trade erected cupola and other furnaces, which, as between them and their landlords, were admittedly trade fixtures. In 1880 the Company conveyed the lands and premises comprised in its lease by way of mortgage to trustees for debenture holders. In 1883 the company executed a second mortgage to trustees for a second set of debenture holders, which comprised, besides the land and buildings, all stock in trade, stock of ores, and loose plant and material. In the course of smelting metals for the company's business small quantities of gold and silver were given off in the form of vapour, and became imbedded in the bricks lining the furnaces. The first mortgagees having sold, the second mortgagees thereupon took proceedings to be allowed, to enter and remove the gold and silver and other metals imbedded in the furnace bricks, which it was claimed were included in the second mortgage and not in the first; although it was admitted that the metals could not be extracted without pulling down the furnaces and pounding up some of the bricks. Mr. Justice Pearson, however, had no difficulty in dismissing the application on the ground that the doctrine of trade fixtures has no application between mortgagee and mortgagor, and that whatever might have been the right of the company as against their landlord, the first mortgagees were entitled to everything that the mortgagors, intentionally or not, and whether for trade purposes or otherwise, had fixed to the mortgaged premises.

The case of *Landers v. Davis*, 15 Q. B. D. 218, however, shows that though the doctrine of trade fixtures may have no application between a mortgagee and mortgagor, yet that a tenant of the mortgagor may be entitled to claim the benefit of that doctrine as against the mortgagee, even though his lease were created subse-

quently to the mortgage. We confess, however, that we have some doubts as to the soundness of the latter decision.

THE Franchise Act of the Dominion Parliament has been discussed *ad nauseam*. We do not propose to refer to it, but merely quote some pertinent observations of Hon. Mr. Senator Gowan in the course of his speech on the subject in the Senate, wherein he alludes, in becoming terms, to the endeavour on the part of some to cast suspicion upon the honour of a profession, which, as a body, would be a credit to any country:—

"An incredible thing has been broadly asserted with all the bitterness of party expression, that the object of the Bill was to enable the Government to appoint pliant partisans for corrupt purposes, and wretched creatures would be found in the several provinces of the Dominion to act as willing tools for that nefarious purpose. I do not think I state too strongly the inference of what was said—said, I must think, in frenzy of political prejudice. But I cannot see how a reasonable man, not hurried into absurd extremes, could think so. If the Government aimed at any such thing the office would be made at pleasure, but the thing is too absurd to dwell upon. I have entire confidence that the present Government will make the best appointments possible, and with the object of securing a just and honest administration of the law; and I will go further and say that I believe if the present Opposition held the reins of Government to-morrow their Government would be just as incapable of acting on such vicious principles. What hope would there be for the future of the country if our public men were capable of such conduct: inducing a judge sworn to the faithful discharge of his duty to violate his oath, and, oblivious to every principle of manhood and Christian duty, to favour a political friend? . . . The talk I have referred to presupposes that members of the Bar would be found willing to sacrifice all that a man holds dear at the beck and nod of a Minister. I can scarcely bring my mind to believe that anyone seriously entertains the idea. I indignantlly repel

THE LAND TITLES ACT.

it as a gross slander upon the noble profession of which I have the honour to be a member. I do so emphatically in the case of the Bar of Ontario, and I speak on the knowledge of nearly fifty years. At the close of the last century the Law Society of Upper Canada was established. In the language of the Act of Incorporation it was declared to be as well for the establishing of order amongst themselves as for the purpose of securing to the Province and to the profession a learned and honourable body to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the Province—and well and nobly have these object been carried out, as the records of the Court, the records of Parliament and the political history of the country abundantly prove. But I cannot think that a doubt of the honour of the Bar has permanent place with any.”

THE LAND TITLES ACT.

THE year 1885 will be a memorable one in the legal annals of the Dominion as being that in which the first practical steps were taken to introduce into the Provinces of Ontario and Manitoba a change in the mode of transferring real estate. Like many other important changes which, of late years, have been made in the law, this one has been effected without creating any great controversy or discussion, and it remains to be seen whether the anticipations of the promoters of the measure will be realized in its practical working.

The operation of the Act of this Province (48 Vict. c. 22) is confined to the County of York and City of Toronto, and, pursuant to the proclamation of his Honor the Lieutenant-Governor, came into force on the 1st day of July last. This Act is mainly based on the Imperial statute, 38–39 Vict. c. 87, which we may say in passing has proved a failure, not so much from any defects in the Act itself, which any one who has studied it

must admit to be an admirable specimen of the draughtsman's skill, but rather from a combined opposition on the part of solicitors, resulting in a general refusal of the public to adopt the benefit of its provisions.

In Ontario it is optional with landowners whether or not they will adopt the system of registration provided by the new Act. If the title to land, however, is once registered under the Act, the land cannot afterwards be withdrawn from its operation, but all subsequent transactions in reference to that land must be conducted according to the provisions of the Act.

The method of registration under this Act differs very materially from the system of registration heretofore in force. Under the new Act the title, and not merely the deed is registered. In other words—not merely the fact that a deed has been made is recorded, but the legal effect of the whole series of deeds in the chain of title is what is registered. In order to the first registration of land under this Act, therefore, it is necessary that an official examination of the title shall be first made, which, wherever an absolute or qualified title is claimed, differs but little from an investigation under the Quieting Titles Act. If upon this examination the title is found satisfactory, it is thereupon registered, that is to say, the person entitled is registered as the owner of the particular parcel, and a certificate corresponding to the entry in the register is delivered to him, and his title is thereafter evidenced by this official certificate, and not by a conveyance as formerly. All subsequent transfers of the land, whether by way of sale, mortgage, or otherwise, will thereafter (with certain exceptions) depend for their efficacy on being passed by the Master of Titles, and their legal effect duly recorded by him. In this way every transaction as it takes place must be scrutinized by the public officer, and its

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legal validity then and there pronounced upon before effect can be given to it by registration; and in this way defects and objections to title will be prevented from smouldering for years to burst out into a flame when least expected, as is too often the case under the system of conveying heretofore prevailing in this Province. The whole scope and object of the Act is, first of all, to give official sanction to titles to land brought under the Act, and thereafter to give official sanction to all transactions which take place in reference to such land.

Having given this brief *resumé* of the purpose and object of the Act we may now turn to the Act itself for a little more detail as to its provisions, and we find that the Act is to be worked by an officer to be called the Master of Titles who is to be a barrister of not less than ten years' standing at the Bar of Ontario, and who is to exercise *quasi*-judicial functions. Mr. J. G. Scott, Q.C., Deputy Attorney-General, has been appointed to fill this position, and we doubt not will prove a very efficient officer.

Owners of an estate in fee simple, legal or equitable, and any person having a disposing power over the fee for his own benefit, and whether free from, or subject to encumbrances may apply to be registered; and any person who has contracted to buy the fee may, with his vendor's consent, also apply to be registered. Lessees may also, under certain conditions, have their titles registered. But no person can be registered as owner of an undivided share; nor can more than four persons be registered as owners of any land. If there are in fact more than four owners they must agree among themselves which four of their number are to be registered.

Three methods of registration are provided. First, registration with an *absolute title*, this is where the title is found by the Master of Titles to be free from defects.

Such a registration is the most complete form of title a person can get. The second is, registration with a *possessory title*. The words *possessory title*, in this Act, however, have not the meaning ordinarily applied to them, viz., the title of a person who has acquired his title to land by length of possession. On the contrary they have a meaning peculiar to the Act, and signify merely that the title of the person who is so registered has not been officially passed by the Master of Titles, but that the person registered with such a title has merely established a *prima facie* right as owner, and that the title of the land thus registered is, notwithstanding the registration, subject to such defects, if any, as existed at the time of its first registration. The effect of such a registration is, that persons dealing with property held under such a certificate will be compelled to satisfy themselves as to the goodness of the title of the person first registered under the Act. In process of time, of course, many titles so registered will become capable of being registered as absolute, and in any case the registration will have the effect of stopping the accumulation of defects of title, as all subsequent transactions in reference to the land thus registered, will take place under the Act and be duly scrutinized by the Master of Titles before they can be registered.

There is also a third method of registration and that is with a *qualified title*. This is where the Master of Titles examines the title of the person registered, and finds it subject to certain specified objections, or encumbrances, or charges. These are specified in the certificate of title; but the title is in other respects as complete as an absolute title. The benefit of this method of registration is that the defects or qualification of the title are explicitly stated on the face of the register, and any person dealing with property so registered has, within the four corners of the certifi-

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cate of title, all the objections specified to which the title is open.

After property has been registered under the Act, a certificate of the first registration is to be registered in the proper registration division, and thereafter the Registry Act is to cease to apply to such land (s. 14).

One most important provision of the Act is that contained in sect. 25, whereby the Statute of Limitations is virtually repealed as to all lands registered under the Act, except those registered with a possessory title only. In other words, possession for any length of time will no longer be able to cut out the title of the registered owner with an absolute or qualified title.

Mortgages upon registered land are no longer to be effected by a transfer of the fee, but by an instrument called a charge which the mortgagee, however, is to be entitled to enforce by sale or foreclosure in the same manner as if the fee were conveyed to him. Mortgages under the Act are very considerably abbreviated, and the form given in the schedule is comprised in seven or eight lines, and a transfer of a mortgage is contained in six lines. A transfer of the fee is reduced to eight lines, and by endorsement on the certificate of title it may be done in two lines. In all documents of charge or transfer under the Act certain usual covenants are by virtue of the Act implied. Provisions are made for the registration of the title of persons who acquire title either by the death of the registered proprietor, or by sales under execution, or by sales for taxes.

Any person claiming an interest in any land may lodge a caution with the Master of Titles, either against the first registration of the land under the Act, or after its registration against subsequent transfers, and a person so entering a caution is entitled to fourteen days' notice before the land is first registered, or before any subsequent transaction can be registered. Any

person improperly filing a caution is liable to make compensation therefor to the person injured. The caution when once lodged continues in force until the expiration of fourteen days after service of notice on the cautioner. Power is also given to the court and to the Master of Titles to inhibit the registration of dealings with the land.

No notice of trusts is to be entered on the register. Persons placing property registered under this Act in the hands of trustees will have to do so on the understanding that the *cestuis que trust*, and not persons dealing with the trustee in good faith, are to take the risk of the latter faithfully discharging his duty as trustee. This will perhaps appear to some persons to be an objection, but we are of the opinion that the Act has placed the responsibility where it ought to be, and where, under most well-drawn trust deeds it is usually placed, by the familiar provision that purchasers dealing with the trustee are not to be required to see to the application of the purchase money. One safeguard, in addition to that of lodging a caution, is provided for the due execution of trusts, and that is this: when the settlor vests the trust estate in two or more trustees he can, by adding the words "no survivorship," prevent any dealing with the trust estate upon the death of any one of the trustees, except under the order of the Court. In this way the check which one trustee is upon his co-trustee will be preserved, as the Court would probably not sanction any dealing with the trust estate until the appointment of a new trustee or trustees to fill the place of the deceased trustee or trustees.

The official certificates of title are incontrovertible except for fraud, and even then only in the hands of the person committing the fraud or having actual notice of it; and in order to protect the rights of innocent persons who may be prejudiced

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by any certificate granted under the Act. an indemnity fund is to be established, This fund is to be created by the exaction of 25c. for every \$100 of the value of property registered under the Act. This fee is only payable on the first certificate of title issued under the Act, and, out of the fund so created, persons who suffer loss by operation of the Act are to be indemnified. The practice under the Act is very largely governed by the Rules appended, which are susceptible of alteration and modification as experience may suggest.

It remains to be considered what course the profession ought to adopt in reference to this Act. In England, as we have seen, the *vis inertiae* of the profession has virtually killed the statute. Things are on a somewhat different footing in Ontario. The profession here responds much more readily than in England to the requirements of business and public convenience. Besides this, conveyancing is, to a large extent, in the hands of unlicensed practitioners, and as soon as the merits of the new system are generally understood by the public (if it has that superiority over the present system in the saving of time and money which is claimed for it), these merits will compel its adoption; and, if the profession were to create difficulties in the way of its success, we fear a remedy might be found by creating a class of land brokers who would speedily monopolize the whole business under the Act. The successful operation of the Act, however, is not by any means dependent on the legal profession; it will largely depend on the liberality of view possessed by the officer appointed to administer it. If he should require every title to be absolutely perfect before it can be registered, the Act cannot be a success. What is wanted to make it work smoothly is a careful discrimination between objections which are really serious and those which are only in effect technical, such as

no prudent man would hesitate to run the risk of. The latter class of objections ought not to be strictly insisted on. It requires undoubtedly a man of considerable experience and breadth of view to make a just discrimination of this sort; we believe, however, it will be found that the first Master of Titles will be equal to the occasion.

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The *Law Reports* for July comprise 15 Q. B. D. pp. 1-196; 10 P. D. pp. 113-130; 29 Chy. D. pp. 253-265.

Very few of the cases in the Queen's Bench and Probate Divisions require any notice here.

HIGHWAY—INJURY TO GAS PIPES CAUSED BY USE OF
STEAM ROLLER.

The first case is *The Gas Light and Coke Co. v. St. Mary Abbott's*, 15 Q. B. D. 1, a decision of the Court of Appeal affirming a judgment of Field, J. The action was brought to restrain the defendants, a municipal corporation, from using a steam roller in repairing the public highway, on the ground that the plaintiffs' gas pipes were injured thereby. The Court held the plaintiffs entitled to the injunction.

STOPPAGE IN TRANSITU—END OF TRANSIT—GOODS
BOUGHT BY AGENT FOR FOREIGN PRINCIPAL.

Ex parte Miles, 15 Q. B. D. 39, is a decision of the Court of Appeal overruling the decision of the registrar in bankruptcy. The case involves an important question of mercantile law. Certain manufacturers sold goods to a commission agent who had been instructed to purchase them by a foreign principal; the goods were to be forwarded to Southampton to be shipped pursuant to the agent's orders, and they were to be paid for by six months' bills to be drawn by the vendors on the agent, and accepted by him. The goods were forwarded to Southampton to the shipping agents named by the commission agent,

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and by the latter's directions were shipped to his principals in Jamaica, the agent being named as consignor, and the principals as consignees. After the ship had sailed the commission agent stopped payment, and the vendors, who had not been paid for the goods, claimed the right to stop them *in transitu*; but the Court of Appeal held that as regards the vendors the transit came to an end when the goods reached Southampton. The Court held that the order from the foreign principal to purchase the goods was a request that the agent should buy in his own name as principal and re-sell to the foreign principals at the same price as he had purchased, plus the commission agreed on, and therefore, that the commission agent was really the purchaser in the first place as principal and not as agent for the foreign principals. The case is noteworthy also for the opinion of Brett, M.R., on the value of the judgments of Wilde, C.J. Referring to a dictum of that learned judge in *Valpy v. Gibson*, 4 C. B. 837, he says, "It is true that this may be said to be only a dictum, because the learned Chief Justice afterwards gave another ground for his decision. But upon mercantile law a written judgment of Wilde, C.J., whether it is a dictum or decision, is as strong an authority as you can well have, and the passage which I have read has always been treated as such."

**TENANT IN COMMON—LESSEE OF CO-TENANT'S SHARE—
USE AND OCCUPATION—REPAIRS.**

In *Leigh v. Dickeson*, 15 Q. B. D. 60, the Court of Appeal affirmed the judgment of Pollock, B., 12 Q. B. D. 194. One tenant in common had leased his share to his co-tenant. The lessee continued in sole occupation after the expiration of the lease; the lessor sued for use and occupation for the period of which exclusive possession was held subsequent to the lease, and the defendant counter-claimed for repairs; and it was held that the plain-

tiff was entitled to recover, as the defendant's exclusive occupation subsequent to the lease was as tenant at sufferance under the terms of the expired lease; but that the defendant was not entitled to recover for repairs which were of an ordinary character, and such as he was not bound to make.

**BREACH OF CONTRACT—SALE OF GOODS TO FULFIL A
CONTRACT BY VENDEE—MEASURE OF DAMAGES.**

The case of *Grébert-Borgnis v. Nugent*, 15 Q. B. D. 85, may be read in connection with the recently reported case of *Corbet v. Johnson*, 10 App. R. 564, as a somewhat similar question was involved in both cases. In the former case the defendants contracted to deliver certain goods by instalments at certain times; when the contract was made the defendants knew that the goods were required by the plaintiff to enable him to fulfil a similar contract, except as to price, which the plaintiff had made with a third party. The defendants broke their contract, and the plaintiff was consequently unable to fulfil his contract with his vendee, who recovered judgment against him in a French Court for £28. The question in controversy was, what was the proper measure of damages; and the Court held that the defendants were liable, not only for the profit the plaintiff could have made had he been able to carry out the sale to his vendee, but also for the damages which the plaintiff had become liable for, for the breach of the contract with his vendee; and in computing these latter damages, the £28 which the French Court had awarded might be allowed as reasonable, although the amount so awarded was not as a matter of law necessarily the amount recoverable. The gist of the decision is thus stated by the learned Master of the Rolls: "Where a plaintiff under such circumstances as the present is seeking to recover for some liability which he has incurred under a contract made by him

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with a third person, he must show that the defendant, at the time he made his contract with the plaintiff, knew of that contract, and contracted on the terms of being liable if he forced the plaintiff to a breach of that contract." This concludes the cases in the Queen's Bench Division.

NOTICE BY TELEGRAM OF THE ISSUE OF PROCESS—
CONTEMPT.

The only case in the Probate Division which calls for any notice is that of *The Seraglio*, 10 P. D. 120, in which notice of the issue of a warrant of arrest against a ship was sent by telegram by the Marshal to his substitute at an out-post, and by the latter communicated to the master of the ship who disregarded it, and by direction of the owner left the port. Sir James Hannen says: "I have only to deal with this matter as a contempt of Court. There is no doubt about the proper way of serving a warrant of arrest, but equally also no doubt as to the way in which notice of its issue may be communicated. It has been done in the present case precisely in the manner in which notice of an order for an injunction is transmitted in the Chancery Division, namely, by telegraph. In that Division, though a formal injunction is no doubt obtained by the party, yet the means of communication by telegraph having become more rapid it is employed by the Court. Everyone knows that in matters of business he cannot with safety disregard a notice given by telegraph, so also it must be understood that a litigant cannot disregard a notice sent to him by telegraph by an officer of the Court. This is so, even if there were reason to doubt the authenticity of the telegram, though then inquiry should be made. But in this case nothing can be more flagrant than the conduct of the owner of *The Seraglio*, who appears to have very distinctly pursued this line of conduct in order to test the law."

ASSIGNMENT OF LEASE—RIGHT OF ASSIGNOR TO INDEMNITY—EFFECT OF SUBSEQUENT PURCHASE OF REVERSION BY ASSIGNOR.

The first case in the July number of the Chancery Division is that of *Re Russell, Russell v. Shoolbred*, 29 Ch. D. 254, which involves a somewhat intricate question as to the relative rights of the assignor and assignee of a lease, where the assignor after the assignment purchases the reversion and also the lease. The facts of the case are somewhat complicated. It may suffice to say, however, that H. and R. being lessees of four houses held under four different leases, H., in 1866, assigned all his interest to his co-lessee, R., the latter giving the usual covenant to indemnify H. against future liability on the covenants in the leases. The rent fell in arrear and H. was sued for, and paid it. Subsequently, in 1883, H. obtained an assignment of the reversion and also an assignment of the leases to R. which had in the meantime passed into other hands, and gave a covenant to indemnify his assignors against future accruing rent. In the present action H. claimed to recover against R.'s estate the rent which he had paid subsequent to his assignment to R., and also the rent which had accrued while he was the owner of the reversion, prior to his obtaining an assignment of the leases under which R. held, and it was held by the Court of Appeal, on appeal from Kay, J., that he was entitled to succeed, and it was held that the right was not defeated by his covenant to indemnify the assignor from whom he acquired R.'s leases, as that only extended to rents thereafter accruing. Nor was it defeated on the ground that the right of R.'s representatives, if they paid the rent, to recover it from the owner of the leases for the time being was interfered with by the assignment of R.'s leases to H., because the latter assignment could not take away any right of action which R.'s representatives

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had against the persons who were lessees when the rent accrued. Nor was the right defeated on the ground that on H. paying the rent he was entitled to a right of distress from the reversioners, which he had destroyed by taking an assignment of the leases; nor had he thereby discharged R.'s estate by releasing a remedy to the benefit of which R. as a surety was entitled; because a right of distress is not a security or remedy to the benefit of which a surety paying rent is entitled under The Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 5 (see R. S. O. c. 116, ss. 2, 3). H. also claimed to recover a gale of rent which had accrued prior to the assignment of the reversion which he had not been called upon to pay, and had not paid, but it was held that, as there was no assignment of the overdue rent, he was not entitled to payment of it as against R.'s estate. There was also a further claim made for dilapidations prior to H. acquiring the reversion. A demand had been made against H. by the reversioner, but he had paid nothing, and in order to get rid of the liability had bought the reversion; and he had also purchased the leases from R.'s assignees for a less sum than their actual value in consequence of the breaches of the covenant to repair. He had since sold the property, and it was held, reversing Kay, J., that in respect of this claim H. could not recover against R.'s estate.

RES JUDICATA—ESTOPPEL—JUDGMENT IN REM.

In the case of *De Mora v. Concha*, 29 Ch. D. 268, the Court of Appeal was called upon to consider the question of how far a judgment *in rem* is an estoppel as regards persons not parties to the proceedings. The case was very ably and exhaustively argued, and Mr. Rigby, Q.C., for the respondent, received the somewhat unusual compliment of being publicly thanked at the conclusion of his argument by Lord Justice Baggallay on behalf of himself and

his colleagues for the ability he had displayed. The facts of the case were as follows: A native of Chili made his will in London; he died in 1880. The will was propounded in solemn form, the executors alleging that the testator was domiciled in England. A daughter who contested the proof alleged the testator was domiciled in Chili, and that his will was not executed according to the laws of Chili. In 1860 the judge of the English Probate Court found that the testator was domiciled in England, and that the will was valid and granted probate to the executors. In November, 1860, a decree of administration was pronounced in the suit of the executors against the residuary legatee and a pecuniary legatee. In 1862 the daughter filed a bill against the executors, alleging that the testator was a domiciled Chilean; that his will being executed in England according to English law was good according to the law of Chili, but only so far as by the law of Chili he could dispose of his property by will; that according to that law he could only dispose of one-fourth of his property, and that the remaining three-fourths belonged to the daughter. The executors set up the decree of the Probate Court as a bar, and no further proceedings were taken in the suit. In 1877 an order was made staying proceedings in the latter suit, but giving liberty to any of the parties to apply to add to the decree in the administration suit all accounts and inquiries necessary to determine the questions in the suit so stayed. Pursuant to this leave the daughter and her husband applied to add to the decree inquiries as to the legitimacy of the daughter, and the domicile of the testator. In 1878 an order was made directing an inquiry as to the legitimacy of the daughter, the rest of the application to stand over. In 1881 and 1882 the conduct of the cause was transferred from the plaintiff (the surviving executor) to the residuary legatee, and

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service of any further proceedings on the plaintiff was dispensed with, and the residuary legatee was appointed to represent the estate of the testator in the cause. In 1884 the application for an inquiry as to the domicile of the testator was renewed against the residuary legatee, without notice to the plaintiff. Bacon, V.-C., granted the inquiry; the residuary legatee appealed, and it was held by the Court of Appeal, affirming Bacon, V.-C., that the decree of the Probate Court was not conclusive *in rem* as to domicile, because it did not appear that the decree was necessarily based on the finding as to domicile, and further, that the finding as to domicile was not binding as between the daughter and the residuary legatee, the latter not being a party to the probate proceedings, and that as the residuary legatee was not bound by the executors litigating the question of domicile unnecessarily, so the daughter was not bound by the finding as against the residuary legatee, since estoppel must be mutual. It was also held that notice to the executor was unnecessary, and the Court refused to hear counsel on his behalf. Bowen, L.J., in giving judgment, says: "It is admitted to be the law of Chili that the will of a domiciled Chilian dying in England would be valid in Chili if executed in conformity with English law. The Court of Probate was therefore not in any way obliged in order to arrive at its judgment *in rem*, to adjudicate between the two domiciles. . . . Whatever be the exact limits of the rule as to the effect of judgments *in rem*, we think accordingly that the adjudication as to domicile does not, and cannot conclude any but the parties to the suit, their privies and those whose interests they represented, to the extent which they lawfully did represent such interests in such a suit." As to how far the executors could properly represent the residuary legatee in the probate suit, he says: "It is manifest

that for many purposes the executors do represent such a legatee. But Adelinda (the daughter) and her husband are not seeking to impeach the title of the executors, the validity of the will, or the interest of the legatee under the will. Their contention is that by the law of Chili the testator could only dispose in favour of a residuary legatee of a portion of his property, and that the residue remained out of the testator's power of testamentary disposition. . . . We are of opinion that as to such a claim executors would not in a probate suit be the representatives of the residuary legatee to bind such a legatee by any issue which might be raised incidentally on a question of domicile, nor *legitimi contradictores* on his behalf in such a suit on such a point, within the meaning of the civil law or the law of this country. The scope of the probate suit is to establish that the will was executed in conformity with the law of the country of domicile, wherever that country was."

JUDGMENT BY DEFAULT—APPEAL.

In *Vint v. Hudspeth*, 29 Chy. D. 322. the Court of Appeal, although not denying its jurisdiction to hear an appeal from a judgment pronounced in the absence of the plaintiff, nevertheless directed the appeal to stand over until the appellant could apply to the judge who tried the cause to rehear the action.

NE EXEAT REGNO—TRUSTEE NOT IN DEFAULT.

The point of practice involved in *Colverson v. Bloomfield*, 29 Chy. D. 341, is of some importance. An order was made that a trustee within seven days after service of the order should pay to the plaintiff a sum found due to him by the Chief Clerk's certificate. The trustee could not be found to be served with the order, and the plaintiff then applied for a writ of *ne exeat* on the ground that the trustee was about to go out of the jurisdiction, but the Court of Appeal, affirming Chitty, J., held, that the trustee not being in de-

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fault, as the order had not been served, that the debt was not now due and payable, and that the writ of *ne exeat* could not therefore be granted.

ADMINISTRATION—RETAINER—DEVASTAVIT.

The case of *Re Rownson, Field v. White*, 29 Chy. D. 358, is one in which an attempt was made by an administratrix to retain a debt claimed to be due by the intestate, under a promise which could not be enforced under the 4th sec. of the Statute of Frauds by reason of its not being in writing. It was argued that although under that section no action could be brought, that nevertheless by analogy to the decisions under the Statute of Limitations, the debt might properly be paid by the administratrix if due to a third party, and might therefore be retained by herself, that in other words the administratrix was not bound to set up the Statute of Frauds any more than she would be bound to set up the Statute of Limitations. As to this point Cotton, L.J., says, at p. 362: "It is quite uncertain what the origin was of allowing an executor to pay a debt against which he had a good defence under the Statute of Limitations, it being the duty of an executor or administrator not to pay claims he is not bound to pay, that is, he is not unnecessarily to diminish the estate which comes to his hands by paying a claim to which he has a defence. We know that there are some people, both judges and other persons, who think that to plead the Statute of Limitations is unconscionable, and in my opinion we must look upon that liberty which has been conceded to an executor not to plead the Statute of Limitations, or, if he has a statute-barred claim of his own, to retain it, not as a principle applicable to other similar cases, but as an exception from the general rule, admitted on the ground of the dislike which is entertained by many people to the plea of the Statute of Limitations."

PATENT—SPECIFICATION—COSTS.

In *Badische v. Levinstein*, 29 Chy. D. 366, the Court of Appeal reversed the judgment of Pearson, J., 24 Chy. D. 156, and held that where the specification for a patent for a chemical process applied equally to several substances, but only one would produce a useful result, and it could only be ascertained by experiment which that was, the patent was void. The patentee failed in establishing the validity of his patent, but succeeded on the issue of infringement, and it was held that he must pay the general costs of the action, but that the defendant must pay the costs of the issue of infringement.

RES JUDICATA—JUDGMENT RECOVERED IN ANOTHER ACTION PENDENTE LITE.

Houston v. Sligo, 29 Chy. D. 448, is one of those cases which we think should not be reported. D., the plaintiff, appealed from a decision of Pearson, J., holding that the defendant could set up as a defence of *res judicata* the recovery *pendente lite* of a judgment in an action in an Irish Court, and that it was unnecessary in the defence to set out the pleadings in such other action in detail. On the appeal the parties submitted to a compromise order which virtually left the whole matter at large for further litigation, and why the case is reported we cannot say.

ACTION OF DECEIT—FALSE REPRESENTATION—CONTRIBUTORY MISTAKE OF PLAINTIFF.

The case of *Edgington v. Fitzmaurice*, 29 Chy. D. 459, was an action of deceit brought by the plaintiff against the directors of a company for issuing a prospectus inviting subscriptions for debentures, and stating that the objects of the issue of the debentures were to complete alterations in the company's buildings, buy horses, and develop the trade of the company, whereas the real object was to pay off pressing liabilities. The plaintiff advanced money on some of the debentures on the faith of these representations, and also under the

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erroneous belief that the prospectus offered a charge on the property of the company, and stated in his evidence, that but for such belief he would not have advanced his money, but that he also relied upon the statements contained in the prospectus. The Court of Appeal, affirming Denman, J., held that notwithstanding the plaintiff was influenced by his own mistake he was entitled by reason of the material misrepresentations made by the defendants to recover against the defendants the amount advanced.

POWER OF ATTORNEY—RECITAL.

The case of *Danby v. Coutts*, 29 Chy. D. 500, strikingly illustrates the caution necessary to be observed by those who deal with a person acting under a power of attorney. The power of attorney in question recited that the plaintiff was going abroad and was desirous of appointing attorneys to act for him during his absence, but the operative part appointed the donees to be attorneys of the plaintiff without any limitation of time; it was held by Kay, J., that the recital controlled the operative part, and that acts done by the attorneys after the plaintiff's return from abroad without his knowledge were not binding on him. The plaintiff went abroad a second time and gave the same attorneys a further power of attorney, reciting that he had been in England and was returning abroad, and again constituting them his attorneys. A bank, from which the attorneys had, after the plaintiff's return from England, borrowed money, which they had, unknown to the bank, converted to their own use, lent further sums under the second power of attorney, but it was not shown that any officer or agent of the bank, who knew of the previous transactions, had seen the recitals in the second power, and it was consequently held there had been no notice or knowledge of facts brought home to the bank to give reasonable ground for suspicion as to the *bona*

fides of the attorneys, and that the subsequent transactions under the second power were therefore valid.

MARRIED WOMAN—TESTAMENTARY POWER.

The short point decided by Chitty, J., in *Rous v. Jackson*, 29 Chy. D. 521, is that when a married woman exercises a general testamentary power, the rule against perpetuities runs from her death and not from the date of the instrument creating the power. In arriving at this decision he refused to follow *Re Powell*, 39 L. J. Chy. 188, decided by James, V.-C.

ADMINISTRATION ACTION—JUDGMENT CREDITOR.

In *Re Womersley, Etheridge v. Womersley*, 29 Chy. D. 557, Pearson, J., refused to restrain a creditor who, prior to the granting of an administration order, had recovered judgment in a County Court against a sole executrix from pursuing his remedy against the executrix personally, but he ordered the receiver to pay the debt out of the assets without prejudice to the question whether the executrix should be allowed the amount so paid. This case of course does not in any way trench on those cases which show that proceedings by the creditor as against the estate will under such circumstances be stayed.

CHARITABLE LEGACY—LAPSE—CY-PRES.

The only remaining case to be noticed in the July number is *Re Ovey, Broadbent v. Barrow*, 29 Chy. D. 560, in which a legacy was left to an ophthalmic hospital which had ceased to exist, and the question was whether the legacy was to be treated as lapsed, or whether it must be administered *cy-pres*, and Pearson, J., determined that it had lapsed. The principle on which he proceeded is stated in *Clark v. Taylor*, 1 Drew, 644, which the learned judge quotes approvingly: "There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the

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mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised, and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity."

REPORTS.

RECENT ENGLISH PRACTICE CASES.

SNELLING v. PULLING.

Costs—Dismissal for want of prosecution—4 & 5 Anne c. 3, 42 and 43 Vict. c. 59.—Ord. 65 r. 1 (Ont. Rule 428).

When an action is dismissed for want of prosecution the defendant is not, as of right, entitled to costs, but they are in the discretion of the judge under Ord. 65, r. 1. (Ont. R. 428.) [C. A.—29 Chy. D. 85.]

LINDLEY, L.J.—. . . "Subject to some exceptions not now material to be considered the new rule has placed all the costs of proceedings in the Supreme Court, including therefore the costs of dismissal of the action for want of prosecution, in the discretion of the judge. There is therefore no appeal in the present case."

HOUSE PROPERTY & INVESTMENT CO. v. H. P. HORSE NAIL CO.

Amendment—Adding parties—Ord. 16 r. 11, (Ont. R. 103 a.)

In an action by lessees for a long term of eleven houses of which ten were unlet and in their possession when the writ was issued, and by their sub-tenant of the remaining house as a co-plaintiff, for an injunction and damages in respect of an alleged nuisance for noise; the tenant after delivery of the defence refused to go on with the action. In the meantime the other ten houses were sub-let, and the plaintiff company at the trial applied for leave to add, as co-plaintiffs, two of the new tenants who consented to be added.

Application granted under Ord. 16 r. 11 (Ont. R. 103 a.), the persons proposed to be added being persons "whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon, and settle all the questions involved in the cause or matter."

CHITTY, J.—"This is a matter of discretion in the Court, and the late Master of the Rolls who took great part in settling the practice, discussed the question in *Broder v. Saillard*, 2 Ch. D. 692. After some argument, though this is not reported at length, the Master of the Rolls gave leave to amend the Bill by adding the occupier as co-plaintiff; and in his judgment in reference to the objection that the owners of the house, the nuisance being a temporary one, could not be properly plaintiffs, he says, 'thinking as I do, that the objection was a valid one, according to the cases of *Mott v. Shoolbred*, L. R. 20 Eq. 22, and *Jones v. Chappell*, *Ib.* 539, I gave the plaintiffs leave to amend, by adding as co-plaintiff the tenant of the house which they did.' . . . The only distinction in this case is that the persons proposed to be added as co-plaintiffs were not tenants at the time when the writ issued."

As the parties were proposed to be added in respect of property originally comprised in the action, the learned judge thought the case on that ground distinguishable from *Dalton v. Guardians of St. Mary Abbott's*, 47 L. T. N. S. 349, and gave leave to amend on the usual terms of the cause standing over and payment of costs of the day, and defendants to be at liberty to put in an amended statement of defence.

HAWKE v. BREAR.

Costs—Arbitration—Costs of action and reference to abide event—"Event" construed distributively.

An action and all matters in difference were referred to arbitration, the costs of the cause, reference and award to abide the event.

Held, following *Ellis v. Desilva*, 6 Q. B. D. 521; 44 L. T. N. S. 209, that the word "event" must be construed distributively, and the plaintiff having succeeded as to the matters in question in the action, and the defendant in respect of a matter in difference not raised in the action the plaintiff was entitled to the costs of the action and the defendant to the costs of the matters in difference not raised by the action.

Gribble v. Buchanan, 18 C. B. 691; 26 L. J. C P. 24 not followed.

[14 Q. B. D. 841.

MATTHEW, J.—. . . "I think the term 'event' in the order of reference must be read distributively and that the costs of the action must abide the event of the action, and the costs of the matters in difference must abide the event of the matters in difference."

RECENT ENGLISH PRACTICE CASES.

SMITH, J.—. . . "It is true in *Gribble v. Buchanan*, a case very like the present, JARVIS, C.J., said that though the construction contended for by the plaintiff was reasonable the practice was the other way. In the case, however, of *Ellis v. Desilva* the Court of Appeal seem to have placed the practice on a more reasonable footing."

EDWARDS V. HOPE.

Set-off of damages and costs—Cross judgments—Solicitor's lien—Ord. 65 r. 14.—Reg. Gen. Hil. Term 1853 r. 63 (Ont. Rule Q. B. 52).

Upon an application to set-off cross judgments in distinct actions the Court may, notwithstanding Ord. 65 r. 14, order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party. Reg. Gen. 63 Hil. Term 1853 (Ont. Rule Q. B. 52) is superseded by Ord. 65 r. 14 and if the latter applies to set-off of judgments in distinct actions the Court has a discretion to allow the set-off subject to, or free from, the solicitor's lien, and if Ord. 65 r. 14 does not apply the Court has the like discretion which the Common Law Courts had prior to Reg. Gen. 63, which is superseded.

[C. A.—14 Q. B. D. 922.]

BRETT, M.R.—. . . "Ord. 65 r. 14 supersedes the old practice under R. G. H. T. 1853 r. 63. Rule 14 says that a set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought. Whether this Rule does, or does not, apply to cases where the set-off is claimed in different actions the same results follow. If it does, the Court has a discretion whether or not it shall allow the set-off. If it does not, the old practice before the Rule of 1853 remains, by which the Court had a discretion, to order what it considered just with regard to the solicitor's lien."

Note.—In Ontario there is no Rule in force identical with the English Rule, Ord. 65 r. 14, which provides that "a set-off for damages and costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." According to the above decision, therefore, it would seem that Rule 52 (Holmsted's Rules and Orders, p. 505) is still in force in this Province.

IN RE BROAD AND BROAD.

Costs—Taxation—Solicitor and client.

Where costs of an unusual and unnecessary character are incurred, a solicitor cannot recover them from his client, even though incurred by his express direction, unless the solicitor informs the client that even if successful he will not, or may not, be able to recover such costs from the opposite party.

Costs of a third counsel disallowed.

[Divl. Court.—15 Q. B. D. 232.]

FIELD, J., referring to the decision of the Court of Appeal in *Blyth & Fanshawe*, 10 Q. B. D. 207, said: "I am of opinion that when the Court of Appeal clearly lays down a general principle as the ground of their decision in the case before them we are bound to follow it. BAGGALLAY, L. J., in delivering judgment in that case, says: 'I take it to be the general rule of law, and an important rule, that is to be observed in all cases, that if an unusual expense is about to be incurred in the course of an action, it is the duty of the solicitor to inform his client fully of it, and not to be satisfied simply by taking his authority to incur the additional expense, but to point out to him that such expense will, or may, not be allowed on taxation between party and party whatever may be the result of the trial.'"

THE LONDON AND YORKSHIRE BANK V. COOPER.

Production of documents—Documents held in right of another.

The defendant had made a promissory note as security for money due by a limited company to the plaintiffs. The defendant had also been liquidator of the company, but the liquidation was at an end and the company had been dissolved. In an action on the note the defendant objected to produce the banker's pass-book and directors' minute-book of the company, on the ground that they were in his custody only as liquidator.

Held, that the plaintiffs were entitled to inspection of the documents as there were no interests which could be affected by their production, except those of the parties to the action. *Murray v. Walter*, Cr. P. 114, *Kearsley v. Phillips*, 10 Q. B. D. 465, and *Vivian v. Little*, 11 Q. B. D. 370 distinguished. [Divl. Court.—15 Q. B. D. 7.]

FIELD, J.—The documents in question are undoubtedly in the defendant's possession; he has a property in them, and power to deal with them in any way he pleases. The cases, therefore, upon which he relied do not apply. In *Kearsley v. Phillips*, which followed *Murray v. Walter*, the Court refused to order inspection of documents which were in the defendant's possession as joint trustee with another person, not a party to the action, and were the muniments of their title as mortgagees.

. . . In *Vivian v. Little* the Court held that the

RECENT ENGLISH PRACTICE CASES.

committee of a lunatic was not bound to produce the title deeds of the lunatic's estate, because they were not in the committee's custody, but in the custody and control of the Court. . . . There would have been great difficulty here in going beyond the doctrine laid down in these cases had not the defendant's counsel admitted that the company was at an end. No shareholder or other person had the smallest interest in the matter.

COLERIDGE, C.J., concurred.

Order of POLLOCK, J., refusing inspection reversed.

PEARCE V. FOSTER.

Production of documents—Papers prepared in suit by a plaintiff against a third party.

The plaintiff objected to produce documents partially prepared by his solicitors in an action previously brought by him against one D. (a person other than the defendant) for future use in carrying on that action, which were never completed or used, owing to the action not having proceeded in consequence of D.'s death, on the ground that the whole of the documents were of a private and confidential nature between counsel, solicitor, and client.

Held, that the documents were privileged from production. *Bullock v. Corry*, 3 Q. B. D. 356, followed.

[C. A.—15 Q. B. D. 114.]

Appeal from order of Divisional Court (POLLOCK, B., and DAY, J.) affirming order of FIELD, J.

BRETT, M.R.—It seems to me clear that these documents did come into existence for the purposes of the consideration of the course to be pursued in the conduct of an action, although the action did not ultimately proceed. Then the question arises whether, assuming them to be within this privilege, the privilege is any the less applicable because in the present case the inquiries with regard to the documents are being made in an action other than that, in regard to which they were originally brought into existence. I do not think if they were privileged in relation to the first action that the privilege ceases in relation to another action. The case of *Bullock v. Corry*, 3 Q. B. D. 356, seems to me to be an authority for that conclusion. . . . The governing principle on the subject seems to me to be correctly laid down in "Bray on Discovery" at p. 371, where the author says: "It would seem clear that the extension of the privilege to all professional communications, whether passing in reference to litigation or not, must cover those which pass in reference to litigation with other persons, or with the same persons at other times."

BAGGALLAY and BOWEN, LL.J., concurred.

Appeal allowed.

RE LOVE.

HILL V. SPURGEON.

Costs—Trustee and Executor.

One executor commenced an action for administration against his co-executor, and a decree was made. There was no misconduct alleged on the part of the defendant. On further consideration, KAY, J., gave the plaintiff costs as between solicitor and client, but gave defendant only party and party costs, holding that two sets of costs as between solicitor and client should not be allowed to the trustees.

Held, on appeal, that defendant was entitled to costs as between solicitor and client as no misconduct was proved against him.

[C. A.—29 Chy. D. 348.]

COTTON, L.J.— . . . "In my opinion a trustee is entitled to costs in the ordinary way, i.e., as between solicitor and client, unless it is established that he has been guilty of some misconduct, which would justify the judge in depriving him of what are the ordinary costs of a trustee. The judge appears to have gone on the ground that he could not allow to the trustees two sets of costs as between solicitor and client. A desire to prevent the costs of litigation being excessive is laudable; but I think that is not a sufficient reason for depriving the trustee, who admittedly has conducted himself properly in the litigation, of the ordinary trustee's costs, that is, costs as between solicitor and client, and in my opinion he must have them." . . .

FRY, L.J., concurred.

Appeal allowed.

WALCOTT V. LYONS.

Adding co-plaintiff—Rules S. C. 1883, Ord. 16 r. 11 (Ont. Rule 103.)

When a tenant for life brought an action against trustees to make them liable for an improper investment and the defendant set up acquiescence, and the plaintiff then applied to add as co-plaintiff his son who had a reversionary interest

Held, that Ord. 16, r. 11 (Ont. R. 103) does not authorize a plaintiff having no right to sue, to amend by adding as co-plaintiff a person who has such right.

[C. A.—29 Chy. D. 584.]

COTTON, L.J.:—" . . . Can it be said under these circumstances that the presence of the son is necessary to enable the Court to adjudicate upon all the questions involved in the cause? I am of opinion that it cannot. The object of the amendment is, that if it is shown that the father has no right to sue, there may be a plaintiff who has such right. It is contended that the main question in the cause is whether there has been a breach of trust. That is not so. The question in the cause is whether there has been any breach of trust of which the father has a right to complain."

FRY and BOWEN, LL.J., concurred.

Order of BACON, V.C., reversed

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.]

[June 8.]

SMART V. SORENSON.

Dower Act of 1879—Dower in equity of redemption—Husband aliening.

On February 21st, 1884, the plaintiff recovered a judgment against C. S. in the suit of *Sorenson v. Smart*, reported 5 O. R. 678, for his costs, and the same were taxed at \$315, and writs of *fi. fa.* placed in the hands of the sheriff of Essex on March 20th, 1884, but the sheriff could make nothing. At the date of the judgment C. S. owned certain lands, subject to a mortgage dated December 2nd, 1881, to one J. A., in which M. S., the wife of C. S., joined and barred her dower. On February 26th, 1884, five days after the above judgment, the lands were sold to C. for \$2,250, and on same day they were conveyed by deed to C., and M. S. joined and barred her dower. C. and C. S. went to the sheriff of Essex and paid several *fi. fas.*, leaving a balance of \$350 due C. S. on the sale of the lands, which C. was to secure by mortgage. On March 14th, 1884, C. executed the mortgage, which was made to M. S. as mortgagee. The plaintiff now bringing this action against C. S., M. S. and C., and claiming that M. S. held the mortgage merely as trustee for her husband, and the defendants alleging that M. S. had dower in the lands, and had refused to join in the deed to C. without getting the mortgage in her name, and thus had given valuable consideration therefor.

Held, that *Henry v. Pringle*, 26 Gr. 68, and *Black v. Fountain*, 23 Gr. 174, are still good law, and a wife only has dower in an equity of redemption where the husband dies seized, and the latter may defeat the right by alienation, and the Dower Act of 1879 does not affect the case of the husband not dying seized of the equity of redemption, and that therefore M. S.

gave no valuable consideration for having the mortgage made to her, and must be declared trustee for her husband.

A. O. Jeffery, for the plaintiff.

PRACTICE.

Chan. Div.]

[Sept. 3.]

MORTON V. HAMILTON PROVIDENT AND
LOAN SOCIETY.

Mortgage—Sale under power—Surplus—Account as to—Scale of costs—R. 515, O. J. A

The order of PROUDFOOT, J., of the 22nd April, 1885 (10 P. R. 636, *ante* p. 179), was affirmed by the Division Court.

Muir, for the appeal.

Watson, contra.

Chan. Div.]

[Sept. 3.]

MASSE V. MASSE.

Action in Chancery Division—Jury notice—Transferring action.

The order of BOYD, C., of the 20th April, 1885 (10 P. R. 574, *ante* p. 179), was reversed by the Divisional Court, following *Pawson v. Merchants' Bank*, decided in the Court of Appeal on the 12th May, 1885.

W. H. P. Clement, for the appeal.

J. C. Hamilton, contra.

Ferguson, J.]

[Sept. 8.]

HILL V. THE NORTHERN PACIFIC JUNCTION
RAILWAY CO.

Single Judge—Power to review findings of referee—Sections 48 and 49 O. J. A.

Held, notwithstanding the language of sec. 50, O. J. A., a single judge, sitting as the Court, has power to review the findings of an official referee upon a reference under sec. 48, O. J. A.

Boulton, Q.C., for the defendants.

J. C. Hamilton, for the plaintiff.

CORRESPONDENCE.

C. P. Div.]

[Sept. 5.]

BULL' V. NORTH BRITISH LOAN CO. ET AL.

Order made at trial—Judge in chambers—Res judicata—Jurisdiction of Divisional Court.

At the trial of the action at the Toronto Assizes ARMOUR, J., endorsed in the record: "Upon my own motion I order that the place of trial in this cause be changed to the town of Belleville, and that this cause be tried at the next assizes there by a jury."

ROSE, J., sitting in chambers, had previously refused to change the place of trial from Toronto to Belleville.

Held, that the question of place of trial was *res judicata* by the judgment of ROSE, J.

Held, also, notwithstanding sec. 28, sub-secs. 2 and 3, O. J. A., that the Divisional Court had jurisdiction to hear an appeal from the order of ARMOUR, J., because of the language of Rule 254, O. J. A., and of the order appealed from.

Seem, Rule 254 does not give a judge a right to interfere with the procedure in the action except at the instance of a party.

Wallace Nesbitt and Urquhart, for the appeal.
Millar, contra.

vision allowing him to continue his practice, notwithstanding he is *ex-officio* a justice of the peace, that police magistrate referred to by your correspondent had better look to himself or your Ottawa correspondent may "go for him."

Yours, etc.,

Walkerton, Aug. 17th, 1885.

B.

To the Editor of the LAW JOURNAL,

SIR.—In addition to what Mr. R. J. Wicksteed has stated in September number of the *LAW JOURNAL*, I would call attention to chap. 100, sec. 2, page 1038, of the C. S. C., 6 Vict. c. 3. s. 2. The Revised Statutes of Ontario, cap. 71, sec. 5, re-enact it. The Act respecting police magistrates c. 72 does not interfere with the 6 Vict. c. 3. s. 2. Neither does the Act respecting the qualification and appointment of justices of the peace, c. 71, R. S. O.

Then by s. 4, c. 72, R. S. O. every police magistrate is declared to be *ex-officio* a justice of the peace, for the city town and county etc., 36 Vict. 48, ss. 306 and 307. A police magistrate being by this Act a justice of the peace, can he practice law, and act as a justice of the peace at the same time, in violation of s. 5. c. 71, R. S. O.?

Yours, etc.

A. R. DOUGALL,

Belleville, Aug. 26.

To the Editor of the LAW JOURNAL:

SIR.—In the *JOURNAL* of 1st September, 1885, there is a letter over the signature of Mr. R. J. Wicksteed referring to disqualifications of police magistrates and justices of the peace, and the writer refers to three statutes of Ontario, naming them as comprising "all the statute law of Ontario respecting the appointment, etc., of the great unpaid and the stipendiary magistrates," and he quotes with approval sec. 20 of cap. 7, Con. Stats. of Manitoba as containing a provision which he suggests Mr. Mowat might follow with advantage.

It is singular that in endeavouring to inform your readers on this matter Mr. Wicksteed should have quite overlooked cap. 71, R. S. O., which is an Act relating to the very matter of which he writes, and in sec. 4 of which there will be found an enacting clause similar to that of the Manitoba statute referred to.

If there be any evil in permitting barristers and solicitors to act as police or stipendiary magistrates, the general public seem not to have found it out as they have not complained of it.

The Manitoba section of the Act referred to seems to have been taken from our Revised Statutes.

Yours truly,

R.

CORRESPONDENCE.

DISQUALIFICATION OF POLICE MAGISTRATES.

To the Editor of the LAW JOURNAL:

SIR.—In your last issue your Ottawa Correspondent when writing under the heading of "Disqualification of Police Magistrates and Justices of the Peace" expresses regret that practising solicitors are not prevented by law from being police magistrates and justices of the peace in Ontario. By referring to sec. 5, cap. 71, R. S. O. he will find provided, "except when otherwise specially provided by law, no attorney or solicitor in any Court, whatever, shall be justice of the peace during the time he continues to practise as an attorney or solicitor," and sec. 4, cap. 72 R. S. O. and sec. 9, sub-sec. 2, cap. 4, 41 Vict., Ont. Stat. provide that police magistrates shall be *ex-officio* justices of the peace: so that unless it be held the appointment as police magistrate of a practising solicitor is a special pro-

FLOTSAM AND JETSAM—LAW SOCIETY OF UPPER CANADA.

FLOTSAM AND JETSAM.

ONCE upon a time the learned wig of an English Chief Justice also got lost on circuit. Lord Ellenborough on one occasion took Lady Ellenborough with him on circuit, on express condition that the carriage was not to be encumbered with bandboxes, and as bad luck would have it—no doubt in just punishment of his lordship's masculine inappreciation of the receptacles—the great judge happened to strike his foot against something in the carriage, which he at once divined to be a bandbox, and instantly pitched out of the window. Sternly commanding the coachman to drive on, his lordship prevented well-meant attempts to recover the flying bandbox, which subsided ignominiously into the ditch by the roadside. The county town reached, Lord Ellenborough proceeded to array himself for the bench.

"Now where's my wig? where is my wig?" he demanded.

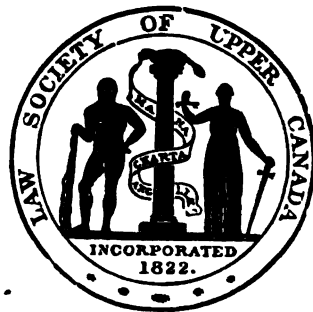
"My lord," said the attendant, "it was thrown out of the carriage window!"

THE *Law Journal* remarks upon an advertisement which recently appeared in a law periodical as follows: "A Barrister of large experience in conveyancing seeks an engagement as conveyancing clerk in a solicitor's office; the highest references given," and says that the practice of the higher branches of conveyancing no longer affords a remunerative occupation. The remark applies in other countries than England.

LITTELL'S LIVING AGE.—The numbers of *The Living Age* for August 29th and September 5th contain The French in North America, *Edinburgh*; The Huguenot Reformation in the Norman Isles, *London Quarterly*; An Appeal to Men of Wealth, by Lord Brabazon, *National*; Footprints, *Blackwood*; A Walking Tour in the Landes, *Macmillan*; Morning Calls in West Country, *Belgravia*; From "Some Reminiscences of My Life" by Mary Howitt, *Good Words*; The Krakatoa Eruption, *Leisure Hour*; The Princesse de Lamballe, and A Margate Grotto, *Temple Bar*; The Crown Diamonds of France, *All the Year Round*; Ground-Rents, *Estates Gazette*; with instalments of "A House Divided against Itself," and "Mrs. Dymond," and poetry.

For fifty-two numbers of sixty-four large pages each (or more than 3,300 pages a year) the subscription price (\$8) is low; while for \$10.50 the publishers offer to send any one of the American \$4 monthlies or weeklies with *The Living Age* for a year, both postpaid. Littell & Co., Boston, are the publishers.

Law Society of Upper Canada.



OSGOODE HALL.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- | | | |
|----------------------|---|--|
| 1884
and
1885. | { | Arithmetic. |
| | | Euclid, Bb. I., II., and III. |
| | | English Grammar and Composition. |
| | | English History—Queen Anne to George III. |
| | | Modern Geography—North America and Europe. |
| | | Elements of Book-Keeping. |

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

- | | | |
|-------|---|----------------------------------|
| 1884. | { | Cicero, Cato Major. |
| | | Virgil, Æneid, B. V., vv. 1-361. |
| | | Ovid, Fasti, B. I., vv. 1-300. |
| | | Xenophon, Anabasis, B. II. |
| 1885. | { | Homer, Iliad, B. IV. |
| | | Xenophon, Anabasis, B. V. |
| | | Homer, Iliad, B. IV. |
| | | Cicero, Cato Major. |
| | | Virgil, Æneid, B. I., vv. 1-304. |
| | | Ovid, Fasti, B. I., vv. 1-300. |

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

LAW SOCIETY OF UPPER CANADA.

* HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

OR NATURAL PHILOSOPHY.

Books—Arnott's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received

his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8 The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

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months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees.....	40 00
Solicitor's Examination Fee.....	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions.....	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission.....	1 00
Fee for other Certificates.....	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886	} Souvestre, Un Philosophe sous le toits.
1888	
1890	
1887	} Lamartine, Christophe Colomb.
1889	

or, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

Canada Law Journal.

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No. 17.

DIARY FOR OCTOBER.

3. Sat. First edition English Bible printed, 1535.
4. Sat. 18th Sunday after Trinity.
5. Mon. County Court and Surrogate Term (ex. York).
Non-jury Sitting of County Court (ex. York) begins.
8. Thur. Harrison, C.J., 1875.
10. Sat. County Court and Surrogate Term (ex. York) ends.
11. Sat. 19th Sunday after Trinity. Guy Carleton, Governor of Canada, 1771.
12. Mon. County Court and Surrogate Term (York) begins.
13. Tue. Battle of Queenston, 1812.

TORONTO, OCTOBER 1, 1885.

THE pernicious example set some years ago by Vice-Chancellor Mowat in stepping down from the Bench into the arena of party politics has been followed by Judge Thompson, of Nova Scotia, who takes the position of Minister of Justice of the Dominion. For either party after this to refer to the subject would indeed be for the pot to call the kettle black. We presume, therefore, there will be very little said about it. That there is now ample precedent for this descent is a misfortune to the country.

THE following is the appearance that the would-be patriot, whose price for selling his countrymen was thirty-five thousand dollars and probably a great deal less, presents to the intelligent editor of the *Central Law Journal*: "Riel is acting like a thorough poltroon, and the people of French descent in Canada appear to be wasting their sympathies on a most worthless character. After having endeavoured to cast the onus of his late rebellion upon his followers he now sets up the defence of insanity. He who takes up arms for a cause and fails, ought to feel that it is a part of his duty to that cause to die like a man. Even such a wretch as Guiteau could do that."

IT would be an insult to their intelligence to suppose that the efforts made by certain French-Canadians to obtain a commutation or reversal of the sentence which has been most righteously passed upon Louis Riel (not here alluding to any right of appeal he may have), arises from any belief in his innocence, his insanity or any unfairness in his trial. The only possible theory for this action is that he is of the same race or religion as his sympathizers. It therefore, comes to this, that the pardon of a criminal, who deserves hanging if ever a man did—who ought to have been hanged years ago for the cold-blooded murder of a loyal citizen, Thomas Scott—is sought simply because he belongs to the ruling race of one of the Provinces of this Dominion. If he were of any other descent we venture to assert that not one voice from any one of the Provinces would be raised to save him from his most just doom.

DURING the past summer the Law Society have beautified the grounds around Osgoode Hall by the introduction of two or three flower beds. Filled with geraniums and verbenas, these beds have added very much to the beauty of the lawns. It was feared that the flowers would be over-run by dogs, or stolen by thieves. Neither contingency has happened. One individual who attempted larceny was caught and summarily punished, and the offence is not likely to be repeated. We see no reason why flowers should not be more extensively cultivated in the Osgoode Hall grounds. It is well known that the Temple Gardens in London are noted for the annual display of chrysanthemums. Why should not Osgoode Hall

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have a similar display? A green-house might be erected at a comparatively small cost, and heated at a very small additional outlay, and by this means the necessary supply of plants could be kept up at no very great expense.

We also noticed in a recent number of the *Law Times*, that the lawn of the Middle Temple is utilized for the playing of tennis. Why could not the west lawn of Osgoode Hall be similarly used? Under proper regulations as to the time within which play should be allowed it could not possibly do any harm, and might prove a source of very great pleasure and amusement to many members of the profession during the summer months. We trust the Benchers will cogitate over the subject and give the matter favourable consideration next year.

LAW FOR LADIES.

A few decisions interesting to the ladies "have been found and made a note of" (according to Captain Cuttle's advice) during the canicular days. Dress is always a fascinating theme to the fair sex, and occasionally the judges consider the subject, not only when the bills of their wives and daughters have to be settled, but when some deep point of law lies hidden in an article of apparel and has to be disposed of. Down in Louisiana it has recently been held that wearing a sun-bonnet in the street is not necessarily an act of negligence. Mrs. Shea owned the bonnet that settled this question. Of the fabric, size and shape of this courted bonnet we know naught. The owner had it on her head and was crossing a street, when the projecting sides prevented her seeing a horse that was bearing down upon her, and she succumbed to the equine. The Court gave her damages for the damage done to her. (*Shea v. Reems*, 36 Louisiana 969.)

Some time since (but as revolving years

and fashions are bringing in again the article to be alluded to—at least so we are told by sisters in law—it may be well to remind our gentle readers of the fact) it was decided in New York State that the use of crinoline was not an act of negligence, even though it was the cause of the accident complained of. Mrs. Mary Poulin was alighting from a car on Broadway with Mr. P.'s youngest hopeful in her arms: her steel hoop skirt caught upon a nail in the car platform, and she was thrown down and dragged some distance. Her injuries were serious and her fright was great. She sued the car company for compensation; they ungallantly pleaded that the article in question was not a necessary article of female apparel, and that if Mrs. Poulin were determined to wear such expansive balloon-like skirts she ought to have exercised more care than is expected of a man. The Court, however, pooh-poohed the notion; said there was no negligence on the lady's part and that if the railroad company took the money of passengers adorned with crinolines they must see to their safety. (*Poulin v. Broadway, etc.*, R. W. 34 N. Y., Sup. Ct. 296.)

We wonder whether the ladies fully understand how much wider their rights in the matter of shopping are when they are forced to leave their husbands, than when they live comfortably at home. Judge Blackburn says: "A husband whilst his wife resides with him chooses his own style of living, at least in theory." (The last four words impress one with the conviction that the judge is a married man, and felt that *in foro domestico*, if not *in banco reginæ*, his decisions were oftentimes overruled and reversed.) He quotes old Judge Hide who remarked that "if a woman will have a velvet gown and a satin petticoat, and the husband thinks mohair or farendon for a gown, and watered tabby for a petticoat, is as fashionable and fitter for his quality," who is to

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decide the controversy? and Blackburn, J., answers the query thus: "Not the wife, nor a jury, it may be consisting of drapers and milliners, but the husband." "But," continues the judge, "when the husband has without cause turned the wife out of doors, or by his own fault has rendered it impossible for her to reside with him, the rule is changed. The husband is no longer the sole judge of what is fit, but the law gives the wife in such a case authority to pledge his credit for her reasonable expenses, leaving it to be determined by others what is reasonable. This increase of liability only comes into play when the husband is in fault, and so it is not unjust." (*Bazeley v. Forder*, L.R. 3 Q. B. 564; *Manby v. Scott*, 1 Sid. 109.)

Lady law students will be relieved to know that fastening important legal papers together by a pin is a sufficient mode of connection, and that it is not less effectual than the old-fashioned lawyer's mode of fastening by a tape. (Sir J. Hannen, *In re Braddock*, 1 P.D. 635.) Mrs. Mary Ann Braddock wrote her own will on two pieces of paper which she attached together by one of these little universal-remedy instruments, and that little act of hers led to the discussion of the matter.

Henry Tudor had so much to do with ladies that he knew the value of good pins, and so, with his consent, his parliament enacted in 1543 that, "No person shall put to sale any pinnes but only such as shall be double-headed and have the heads soldered fast to the shank of the pinnes, well smoothed, the shank well shapen, the points well and round filed, canted and sharpened."

The name of this very much married king suggests matrimony, and Sir James Hannen, of the Probate Division, has lately been giving his views on the marriage contract. His words are: "It appears to me that the contract of marriage is a very simple one, which does not re-

quire a high degree of intelligence to comprehend. It is an engagement between a man and a woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman." (*Durham v. Durham*, 10 P.D. p. 82.)

His lordship evidently considers that while being led to the hymeneal altar, a young lady can be shy, nervous and absent minded, without its being a necessary inference that she is *non compos mentis*. (Ib. p. 90.) Sir James has been eavesdropping and listening to the unguarded utterances of young men and maidens, and then has mounted the bench and sat upon them—for he says, with all the weight of ermine and horsehair: "It is to be observed that it is not unusual at the present day for young men and women to apply such terms as 'dreadful' and 'awful,' without any nice consideration of their fitness." *O tempora! O mores!* His opinion of the education possessed by the women of the upper classes is not flattering to the aristocracy of England. In speaking of the beautiful but unfortunate Countess of Durham, he remarked: "I think it appears from her letters that she was a person of low intellectual powers; but she was capable of receiving the ordinary education of young ladies of her class." (Ib. pp. 88, 84.)

In a recent case a gentleman complains that, when his proposal of marriage was accepted, the young lady did not return his kiss. (Ib. p. 88.) But what is a kiss? asked a paper lately; and then replied, the question can only be answered by experience, and quoted a case in which the Judge of the County Court of Lambeth, England, held that a kiss was not a legal consideration. A surgeon in Lambeth

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kissed a workingman's wife; the husband valued the sweetness taken at £5; and the surgeon gave an I. O. U. for that amount. A month after date an action was brought upon this document, but the judge promptly ruled there was no consideration, and gave a verdict for the amorous son of Æsculapius. Did this lay down a general principle, or is every case to be decided upon its merits? Certainly there are kisses and kisses. (30 *Albany L. J.* 81.) A kiss has frequently been held to be an assault, and it is sometimes a source of substantial damages. Miss Cracker sued a railway company because one of the conductors had kissed her in the car; and she recovered a verdict of \$1,000, upon the ground that it is a carrier's duty to protect his passengers against all the world. (*Cracker v. C. & N. W. Ry.* 36 Wis. 657.)

Elizabeth's parliament declared that "all persons fayning to have knowledge of Physiognomie or like Fantasticall Ymaginacions" should "be stripped naked from the middle upwards and openly whipped until his body be bloodye." (39 Eliz. c. 4.) Anne modified the punishment; two of the Georges said that all such persons were to be deemed rogues and vagabonds, and were liable to be publicly whipped, or sent to the house of correction until the next sessions. (13 Anne, c. 23; 17 Geo. II., c. 5; 5 Geo. IV., c. 83.) Yet, notwithstanding these dread penalties, if we had been acquainted with Mrs. Cloyes while she was still a spinster fancy free, and if we had been endued with any knowledge of "physiognomie" or the art of discriminating character by gazing on a person's outward appearance, we should certainly have warned her against the mean wretch that tempted her into the state of matrimony. He, contemptible man that he was, gave her his cheque for \$400 as a wedding-gift. Of course this generous donation was placed among the wedding

presents to be gazed at, talked about by the wedding guests and duly chronicled in the morning and evening papers. Afterwards, they twain having become one flesh, this man—whose manhood might have been rattled in an empty chestnut shell—declined to pay the cheque, and successfully defended an action thereon. The Court, in giving judgment in his favour, said: "A subsisting contract to marry is not a legal consideration for new contracts afterwards entered into between the parties, unless the new contract formed part of the consideration for the contract to marry. When the cheque was delivered the contract to marry was a valid and subsisting contract. The action cannot be maintained upon the theory that the cheque was a valid 'gift.' The word 'gift' signifies an actual transfer *in presenti* of property without consideration. The cheque does not transfer *in presenti* to the payee \$400, or any part of the funds standing to the credit of the drawer upon the books of the drawee. No specific property was transferred by the defendant to the plaintiff. It was a naked promise. The cheque being without consideration cannot be sustained. (Byles on Bills, 13th ed. 126). There is a broad distinction between the gift of the cheque or obligation of a third person and the gift of the donor's promise to pay." (*Cloyes v. Cloyes*, 36 Hun, 145.)

After reading such a case one is delighted to find that a husband must pay his wife's funeral expenses, no matter how much money she may have left nor to whom she may have left it. Even though a third person gets her money and assists in the direction of her funeral, the husband must pay for it all. (*Sears v. Gidday*, 41 Mich. 590.) And he cannot claim reimbursement from her estate for either the expenses of interment or of a monument which he may have erected over her ashes. (*Smyley v. Rees*, 53 Ala. 89; S. C. 25 Am.

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Rep. 598.) Indeed, should the undertaker recover his charges from the wife's executor, as he may, yet the latter may in his turn recover from the husband. (*Darmody's Case*, Leg. Int., March 7, 1879.) And the Courts seem inclined to hold that a burial merely conforming to the requirements of public decency may not be sufficient, but that it should be suitable to the position of the husband. (*Smyley v. Rees*, *sup.*; *Jenkins v. Tucker*, 1 H. Bl. 90.)

Apparently the only way for a husband, if he has anything, to avoid paying for the funeral of his wife is for him to die first (sometimes this is a real gain to the wife and her estate); then the principle that the husband's death revokes the wife's authority to bind him comes into play, and his estate gets free of these expenses. (*Livill v. Kreidler*, 3 Rawle., Pa. 300.)

All this is for our lady readers, whose name is Legion. R. V. R.

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The August number of the *Law Reports* comprises 15 Q.B.D. pp. 193-314; 10 P.D. pp. 129-137; 29 Chy. D. pp. 565-749, and 10 App. Cas. pp. 351-437.

MORTGAGE—TRADE FIXTURES.

The right of a mortgagee to fixtures placed on the mortgaged premises, was held in *Sanders v. Davis*, 15 Q. B. D. 218, not to extend to fixtures placed by a tenant of the mortgagor who held under a lease made subsequently to the mortgage. This is the decision of a Divisional Court composed of Pollock, B., and Manisty, J. It was conceded that in the absence of any express reservation to the contrary, if the fixtures had been placed by the mortgagor himself on the premises they would have passed to the mortgagee; and it seems a somewhat doubtful proposition, that the mortgagor can give his assignee a privilege which he did not possess himself. This case should be read in connection with the decision of Pearson, J., in *Tottenham v. Swansea*, 52 L. T. N. S. 738.

STATUTE OF FRAUDS, S. 17—ACCEPTANCE OF GOODS.

The construction of s. 17 of the Statute of Frauds, that ever fruitful source of litigation, is the subject of discussion in *Page v. Morgan*, 15 Q.B.D. 228. The defendant had purchased a quantity of wheat by sample; a number of sacks were delivered under the contract at his premises, and he opened the sacks and examined their contents to see if they were equal to sample, and immediately after gave notice to the seller that he refused the wheat as not being equal to sample; and the question was, whether there had been an acceptance by the defendant sufficient to satisfy the statute. The Court of Appeal affirming the Divisional Court of the Queen's Bench Division, held that there had. The learned Master of the Rolls, adopting the principle laid down in *Kibble v. Gough*, 38 L.T.N.S. 204, said:—

"There must be under the statute both an acceptance and actual receipt, but such acceptance need not be an absolute acceptance—all that is necessary is an acceptance which could not have been made, except upon admission that there was a contract, and that the goods were sent to fulfil that contract."

CONTRACT—MARRIED WOMAN—M. W. PROPERTY ACT, 1882.

The English Married Women's Property Act, 1882, is, as was to be expected, giving rise to a plentiful crop of cases. It will be remembered that prior to that Act it had been determined in *Pike v. Fitzgibbon*, 17 Ch. D. 454, and other cases, that a married woman's contract only bound such separate property as she had at the date of the contract and continued to have at the time judgment was recovered against her. To remove this absurdity from the law was one of the objects of the English Act, and of our own recent statute (47 Vict. c. 19, O.). In the case of *Turnbull v. Forman*, 15 Q. B. D. 234, the Court of Appeal have, however, determined that the provisions of the statute directed to this object (*viz.*, s. 1, ss. 3, 4) have not a retrospective operation, so that as to contracts made by a married woman prior to our statute 47 Vict., the old rule laid down in *Pike v. Fitzgibbon* still holds good.

LANDLORD AND TENANT.

In *Hogg v. Brooks*, 15 Q.B.D. 256, the Court of Appeal affirmed the decision of Matthew, J., noted *ante* p. 169.

RECENT ENGLISH DECISIONS.

VENDOR AND PURCHASER—RESTRICTIVE COVENANTS
—NON-DISCLOSURE OF—RIGHT TO RESCIND.

In *Nottingham Patent Brick Co. v. Butler*, 15 Q.B.D. 261, Wills, J., deals with the right of a purchaser to rescind a contract for sale on discovering restrictive covenants affecting the property not disclosed by the vendor, and contained in deeds which he was not bound to produce. Notwithstanding certain conditions of sale, and the provisions of the English Conveyancing Act of 1881, the learned judge held that the purchasers were entitled to rescind the sale, and recover their deposit.

BILL OF SALE—AFTER ACQUIRED CHATTELS—LEGAL
AND EQUITABLE ESTATES—JUD. ACTS, 1873 & 1875.

The case of *Joseph v. Lyons*, 15 Q.B.D. 280, turns on the effect of a bill of sale whereby a jeweller for valuable consideration assigned to the plaintiff his after-acquired stock in trade, subject to a proviso for redemption; but before the plaintiff took possession of the after-acquired stock, the jeweller pledged it with the defendant, who had no notice of the plaintiff's bill of sale. The action was brought by the plaintiff to recover the property, but it was held by the Court of Appeal, reversing the judgment of Huddleston, B., that the defendant had the better right because the bill of sale only passed an equitable interest and not the property in the after-acquired goods, and that this interest could not prevail against the owner of the legal title without notice. It was contended that the effect of the Judicature Acts was to abolish the distinction between law and equity, but Lindley, J., dealing with that argument says:—

"Certainly that is not the effect of those statutes, otherwise they would abolish the distinction between trustee and *cestui que trust*. In the present case the defendant has the legal title, and he has not had either express or even constructive notice of the plaintiff's equitable title."

WILL—CONSTRUCTION.

The Court of Appeal in *Limpus v. Arnold*, 15 Q.B.D. 300, affirm the decision of the Divisional Court—noticed, *ante* vol. 20, p. 335—Cotton, L.J., dissenting.

LANDLORD AND TENANT—DISTRESS—ENTRY.

The Divisional Court (Field and Manisty, JJ.), in *Crabtree v. Robinson*, 15 Q.B.D. 312, decided that an entry may be made into a house by a landlord for the purpose of distraining, by

further opening a window which is partially open. Manisty, J., who gave judgment, says at p. 314:—

"The cases seem to result in this: that to make an entry the latch of a door may be lifted though the door be closed; but that in the case of a window, entry can only be made if the window is to some extent open, and that for the purpose of entry in such cases the window may be further opened."

This concludes our review of the cases in the Queen's Bench Division. Neither of the cases in the Probate Division calls for any observation. We now proceed to consider the cases in the Chancery Division.

BILL OF COSTS—TAXATION AFTER PAYMENT.

The first case to be noted is *In re Boycott*, 29 Chy. D. 571, in which the Court of Appeal reversed the order of Bacon, V.-C., directing a taxation of a solicitor's bill after payment, on the ground of the absence of special circumstances justifying the order. Mortgagees were proceeding to sell the mortgaged estate, the mortgagor found a transferee. On the 1st September the mortgagor's solicitor wrote proposing to complete the transfer on the 3rd September. The mortgagee's solicitor subsequently proposed the 10th September for completing the transfer. On the 9th September he delivered his bill, amounting to £450, to the mortgagor's solicitor who wrote complaining that it was excessive. On the 13th the transfer was completed and the bill of costs paid, the mortgagee's solicitor refusing to deliver up the deeds except on payment. A written protest was delivered to him by the mortgagor's solicitor, and he then expressed his willingness to reconsider his bill if any item were shown to be erroneous; but said nothing to the effect that it was to be treated as open to taxation. The mortgagor applied for taxation, alleging pressure and overcharges, but not referring to any specific item of overcharge. Both Cotton and Fry, LL.J., were of opinion that as the shortness of time between the delivery of the bill and the time fixed for completion did not arise from any act of the mortgagee's solicitor, but was owing only to the mortgagor's desire for speedy completion, there was no pressure such as to justify taxation, though the case would have been otherwise

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if the mortgagees had been pressing for a settlement. Bowen, L.J., however, dissented, and was in favour of directing a taxation, considering that the mortgagee's solicitor had taken advantage of the inconvenience which would have resulted from delay which, in his opinion, amounted to a special circumstance.

AGREEMENT TO ASSIST IN AN ILLEGAL BUSINESS.

The case of *Davies v. Makuna*, 29 Chy. D. 596, although turning on the construction of certain acts of parliament having merely local operation, is nevertheless deserving of notice as establishing an important general principle. The plaintiff, who was disqualified by statute from practising as a medical practitioner, carried on that business, and engaged the defendant to assist him, and the defendant bound himself not to practise in the same town for five years after the close of the engagement. The action was brought to restrain the defendant from violating this contract. But the Court of Appeal, reversing the decision of Pearson, J., held the agreement to be illegal. The Court, however, seem to have been of opinion that if the plaintiff had merely carried on the business of a medical practitioner by means of duly qualified assistants without himself acting personally, that the case would have been different, and the plaintiff under such circumstances might have been entitled to an injunction.

VENDOR AND PURCHASER—CONDITIONS OF SALE—
RIGHT TO RESCIND.

The Court of Appeal in *Dames v. Wood*, 29 Chy. D. 626, affirm the decision of Bacon, V.-C., 27 Chy. D. 172, which we noted *ante* Vol. 20, p. 416. Property had been sold subject to a condition that if the purchaser should take any objection or make any requisition which the vendor was unable or unwilling to comply with, the vendor might rescind the contract. Requisitions were delivered which the vendor refused to comply with, the purchaser insisted on them, and the vendor then rescinded the contract. The purchasers objected to the rescission and withdrew the requisition, and expressed their willingness to complete, but the Court held that the purchaser could not thereby prevent the rescission of the contract.

BONUS DIVIDEND—CAPITAL OR INCOME—TENANT FOR
LIFE AND REMAINDERMAN.

The case of *In re Bouch, Sproule v. Bouch*, 29 Chy. D. 635, is a decision of the Court of Appeal reversing a judgment of Kay, J. The question in controversy arose as to the relative rights of a tenant for life and remainderman to certain bonuses and additional shares in a company allotted in respect of shares of which the tenant for life was only entitled to the income. The shares in question formed part of the residuary estate of a testator which was bequeathed in trust for his widow for life. After the testator's death a reserve fund of £100,000 and an "undivided profit fund" of £36,070, more than half of which arose from profits earned before the testator's death, were distributed by the company among the shareholders as a bonus dividend, and certain new shares were created and allotted to the existing shareholders in proportion to the number of shares held by them, on which £7 10s. was to be paid on each share on allotment. The trustee under the will accepted the shares, and paid the call thereon out of the bonus dividend. After the death of the tenant for life, the question arose whether the new shares, having been paid for out of the bonus dividend, were the property of the deceased tenant for life's estate, or whether the remainderman was entitled thereto. Kay, J., held that the bonus dividend and the new shares were capital, but the Court of Appeal now determine that there is no rule that where a sum, whether called bonus or dividend, is distributed by a company among its shareholders it must, if it is paid out of the accumulated profits of past years, be treated between tenant for life and remainderman as capital. The real question is whether the company, having the power of distributing its profits as dividends or of converting them into capital, has taken the former or the latter course.

VENDOR AND PURCHASER—DEFECTS IN TITLE—
LICENSE TO ASSIGN.

The case of *Ellis v. Rogers*, 29 Chy. D. 661, is another decision of the Court of Appeal in which they affirm the judgment of Kay, J., but on different grounds to those assigned by that learned judge. The action was brought by a vendor against a purchaser to recover dam-

RECENT ENGLISH DECISIONS.

ages for breach of contract to purchase an interest in certain lands. A railway company agreed to demise to the plaintiff the land in question, which they had acquired under their compulsory powers. The plaintiff was restrained from assigning without license. The property formed part of an estate which, prior to its acquisition by the railway company, had been sold in lots subject to certain restrictive covenants for the benefit of the owners of the different lots. The conveyance to the company was made subject to these restrictive covenants. The plaintiff agreed to sell his interest under the contract to the defendant, who at the time knew of the restrictive covenants, but erroneously supposed they were extinguished. The plaintiff was ignorant of the existence of these covenants. The defendant, having subsequently discovered that the restrictive covenants still bound the property, objected to the title. The plaintiff's solicitors replied that the purchase by the railway company had extinguished them, which was not the case. The plaintiff had not obtained a license to assign. The defendant having refused to complete his contract, the action was brought. Kay, J., was of opinion that the failure of plaintiff to procure a license to assign precluded his recovery, as he was never in a position himself to complete the contract. But the Court of Appeal, while supporting the judgment of Kay, J., dismissing the action, did so on the ground that the purchaser had a *prima facie* right to a good title free from the restrictive covenants, and that in order to deprive him of that right it was necessary to show that at the time of the contract he knew that a good title could not be made. The point on which the Court of Appeal proceeds is thus stated by Cotton, L.J.:—

"It might under some circumstances have been necessary for us to decide on which of the two grounds the right to a good title rests, whether it depends on an implied term in the contract, or is a collateral right given by the law. But in the present case I think we need not decide that question, for, whatever be the foundation of the rule it is necessary, in order to bring a case within the exception, that there should be knowledge on the part of the purchaser that he cannot get a good title. Here such knowledge is not shown. It is true that the purchaser knew of the covenants, but he believed that they were done away by the com-

pany's taking the land under their compulsory powers." The vendor knew nothing of the covenants. The purchaser knew of them but thought that they had been discharged, so that both parties were contracting on the footing that a good title was to be made, and as a good title cannot be made the purchaser is not bound."

PURCHASE BY TENANT FOR LIFE OF REVERSION—REMAINDERMAN.

The case of *Phillips v. Phillips*, 29 Chy. D. 673, is an important decision of the Court of Appeal overruling Bacon, V.-C. A tenant for life of certain household property purchased the reversion, and the question was whether he was entitled to hold it for his own benefit, or whether the purchase enured to the benefit of the remainderman. Bacon, V.-C., decided in favour of the tenant for life, but the Court of Appeal were of opinion that the purchase enured to the benefit of the remainderman. Brett, M.R., says at p. 681:

"It is a well-established doctrine of a Court of Equity that the trustee or tenant for life of a lease can renew it only for the benefit of the estate. We are now asked to apply this doctrine to a case where the tenant for life has purchased the reversion. This is, no doubt, an extension of the principle; but I think that it is an extension which we ought to sanction."

VENDORS' AND PURCHASERS' ACT—INTEREST PAID BY MISTAKE.

The short point involved in *In re Young & Harston*, 29 Chy. D. 691, is that under the Vendors' and Purchasers' Act, which enables a vendor and purchaser to apply in a summary way to a judge in chambers in respect of "any question arising out of, or connected with, the contract," a purchaser who by mistake has paid interest on his purchase money, cannot apply in a summary way to recover it back, but must bring an action.

REGISTRY ACT—SHARE OF PROCEEDS OF SALE OF LAND—INCUMBRANCES—PRIORITY.

In the case of *Arden v. Arden*, 29 Chy. D. 702, Kay, J., disposes of a question of priority arising under the Middlesex Registry Act, the learned judge holding that that Act is intended to apply only to dealings at law or in equity with the land itself; and that therefore an incumbrancer upon a share in the proceeds of real estate in Middlesex devised in trust for sale obtains no priority over other incum-

RECENT ENGLISH DECISIONS—CANADIAN PACIFIC RY. V. HARRISTON.

brancers by prior registration; and that the priorities are regulated by the date at which the incumbrancers give notice to the trustee.

COMPANY—DEBENTURES—MORTGAGE—PRIORITY.

Wheatley v. Silkstone Coal Co., 29 Chy. D. 715, is a decision of North, J., upon a question of priority arising between the debenture holders of a joint stock company and certain mortgagees. The debentures purported to charge the undertaking and the hereditaments and effects of the company with the payment of the sums mentioned in the debentures respectively, to the intent that the debentures might rank equally as a first charge on the undertaking, hereditaments and effects of the company. After the issue of these debentures the company deposited title deeds with the plaintiff as security for an advance, and by a written agreement charged the property comprised in the deeds with the payment of the loan. North, J., held that the plaintiff was entitled to priority over the debenture-holders. The reason of the judgment may be gathered from the concluding paragraph, where the learned judge says:—

"In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent, and has not the effect of in any way preventing, the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and inasmuch as I find that the ordinary course of business, and for the purpose of the business, this mortgage was made, it is a good mortgage upon, and a good charge upon, the property comprised in it, and is not subject to the claim created by the debentures. I find also that the first charge referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises and can have effect given to it."

The foregoing case may be considered in connection with that of *Re Horne & Hellard*, 29 Chy. D. 736, when a company had issued debentures for £500,000, by which they charged their property "to the intent that the same charge shall, until default in the payment of the principal or interest to accrue due or become payable in respect of the said sum of £500,000 or some part thereof, be a floating security upon the undertakings, works and

property of the company, not hindering sales or leases of, or dealings with any of the property or assets of the company in the course of its business as a going concern." The company having afterwards contracted to sell some of their land, the purchaser required evidence that there had been no default in payment of the principal or interest of the debentures, and it was held by Pearson, J., that he was entitled to this evidence.

CREDITORS' DEED—TIME FOR EXECUTING.

The only remaining case in the Chancery Division is that of *Re Meredith, Meredith v. Facey*, 29 Chy. D. 745, in which Pearson, J., determined that creditors who had failed in a contest which they raised claiming priority over a creditors' deed, could not afterwards be allowed to execute and take the benefit of the deed.

REPORTS.

CANADA.

ASSESSMENT CASES.

CANADIAN PACIFIC RAILWAY COMPANY V. HARRISTON.

Assessment Act s. 26—Land of railway company—How to be assessed.

[Guelph, July, 1885.]

The assessment of the railway company's property in Harriston was as follows:—Station and outbuildings, \$1,500; land occupied by roadway and station, eight and a-half acres, \$1,200. The land occupied was part of two farm lots within the municipality assessed at \$32 and \$22 per acre respectively, being a strip bounding on the south the said lots and next to an unopened road allowance which was assessed at \$137 per acre. South of the road allowance the next original farm lot was laid out into quarter acre town lots assessed at \$100 per lot.

The evidence showed that there were no buildings on the farm lots in question of any value, and that some four acres of said lots leased by the railway until 1884 had been surrendered to the owner in 1885. These four acres up to 1884 were

CANADIAN PACIFIC RY. V. HARRISTON—IN RE LAVEN V. ST. THOMAS—JOLIFFE V. BOARD OF EDUCATION.

assessed at \$100 per acre; but in 1885 on their reverting to the original owner they were only assessed at \$32 per acre.

On an appeal to the county judge by the company *Mr. MacMurchy* (Wells, Gordon & Sampson) for the appellants contended that the roadway should only be assessed on the basis of the lots in which it actually lay, and that the assessment of the town lots or unopened road allowances, none of which was intersected by the railway, should not be regarded as arriving at the assessment contemplated by the Act R. S. O. c. 180, s. 26, sub-s. 1. He referred to *G. W. R. Co. v. Rouse*, 15 U. C. Q. B. 168; *Re Midland Railway Co. and Uxbridge*, 19 C. L. J. 330, 347.

Ebbels, for the respondents, contended that the clause in the statute should be construed as meaning that the assessment of the town lots, etc., adjoining the roadway should be taken into account as well as the lots in which the roadway actually was located, and that inasmuch as the railway had, to some extent, stopped the progress of the town northwards and prevented town lots being laid out north of the track the railway should be assessed on the basis of town lots being laid out on both sides of the track.

DREW, Co. J., allowed the appeal reducing the assessment of the land to \$230 being the average \$27 obtained from the farm lots in question. He held that the statute was imperative and that the roadway must be regarded as so much land belonging to the farm lots in question, and should be assessed accordingly.

IN RE LAVEN AND ST. THOMAS.

Assessment Act sec. 33—Salaried officer of railway company having business all along the line—Where to be assessed.

[St. Thomas.

Appeal from the Court of Revision of the City of St. Thomas.

This appellant resided in Hamilton. He was a salaried officer of the Michigan Central and Canada Pacific Railway Companies. He had an office where the headquarters of his department were situated at Toronto, but his duties were not confined to that city, but were performed as occasion required all over the lines of the above railway.

HUGHES, Co. J.—The appellant is not assessable in Hamilton, where he resides, at all, unless he is required to perform duties or discharge functions of his office there.

He comes to St. Thomas to perform duties as occasion requires, more or less frequently, during the season of summer excursions. St. Thomas

is the headquarters of the Canada Southern Railway, which has been leased to and is operated by the Michigan Central Railroad Company, a foreign corporation, and he comes to these headquarters to perform that part of his duties occasionally.

In the absence of any certificate of his being otherwise assessed under the provisions of the 33rd section, I think he is rightfully assessed in respect of the amount of his salary at any of the municipalities in which he does not reside but performs duties, and St. Thomas being one of these the assessment is right.

Appeal dismissed with costs.

NINTH DIVISION COURT, LEEDS AND GRENVILLE.

JOLIFFE V. BOARD OF EDUCATION OF SCHOOL SECTION NO. 6 IN TOWNSHIP OF YONGE AND ESCOTT REAR.

High school master's salary—Release from engagement—Vacation.

[Brockville

This is an action in which plaintiff sought to recover the sum of \$41.66 as balance of salary claimed to be due him as head master of the high school at Farmersville in the County of Leeds.

The facts appeared to be that plaintiff was engaged by defendants for the year 1884 at a salary of \$1,000 per annum. No document under seal was executed, but a resolution of the Board was passed. The Board was a union Board. The plaintiff desiring to obtain another situation sent to the trustees a letter dated 23rd July, 1884, resigning his position, such resignation to take effect on the 30th August then next. By resolution of the Board, passed at a meeting held on the 23rd July or shortly afterwards, the resignation was accepted. According to the evidence the question of salary was discussed orally by the plaintiff, and some of the trustees. At the meeting *Mr. Saunders*, one of the trustees, says plaintiff said: "he would leave whole matter of salary with Board. He was asked how much he would take and answered \$650. We were willing to give \$600. Afterwards I said we would give \$625." Another trustee swore that the plaintiff said he was entitled to the whole of the vacation. *Mr. Saunders* said he was only entitled to \$600. The plaintiff said he would leave the matter with the Board, and after more conversation said he would take \$650. *Mr. Brown*, another member of the Board, swore that there was a difference of opinion among the trustees as to allowing plaintiff to go.

JOLIFFE V. BOARD OF EDUCATION—MORISON V. ASHMAN, BIRMINGHAM V ASHMAN.

that plaintiff as he arose to go said: "I will leave it with the Board" and passed out. Mr. Boddy swore that the plaintiff said he would leave what they should do as to his resignation to the Board; that this referred to remuneration. Mr. G. P. Wight, another trustee, swore that plaintiff said he would "leave it to the generosity of the Board what he was to receive for vacation"; that it was agreed that \$600 would cover the time he had taught and a portion of the vacation, and at the next meeting of the Board it was resolved to give him \$25 on account of vacation—the \$625 to be in full.

MACDONALD, Co. J.—If the decision of the case rested merely upon the resignation and the acceptance thereof, I would decide in favour of the plaintiff—owing to the terms of such resignation and acceptance. Section 161 of chapter 204 of the Revised Statutes of Ontario (which enacts that "all agreements between trustees and teachers, to be valid and binding shall be in writing, signed by the parties thereto, and sealed with the corporate seal of the trustees") only, applies to public school teachers. Without at all deciding whether or not this enactment could be successfully pleaded in bar of an action brought by a public school teacher who had without such an agreement completed a term of teaching and was seeking by such action to recover the agreed salary, it certainly does not apply to a high school teacher, nor can the provisions of sections 153 and 154 of chapter 204, or of sections 13 and 14 of chapter 205, in any way be strained to support such a contention. Indeed I do not remember that it has been stated that they do. The enactment which appears to bear upon the employment of high school masters is sub-section 11 of section 39 of chapter 205, while under the provisions of section 50 of the same Act, "every master or teacher of a high school or collegiate institute shall be entitled to be paid his salary for the authorized holidays occurring during the period of his engagement with the trustees, and also for the vacations which follow immediately on the expiration of the school term during which he has served, or the term of his agreement with such trustees."

I say again that if the decision of the case rested merely upon the resignation and the acceptance thereof, I would decide in favour of the plaintiff. But such is not the case. The plaintiff was under engagement for all of 1884. He sought to be released and put himself into the hands of the trustees. Instead of refusing to let him go they acceded to his request and decided to allow him his salary for a portion of the vacation. This all appears very reasonable, and I do not think the plaintiff is justly entitled to recover more than the sum allowed by the trustees. He appears to rely, to some extent

at least, on the fact that public moneys were given to the trustees to be applied towards salaries, and that he is entitled to recover all moneys so given which were allotted for a head master, or for him (as case may be), for the term during which he was employed. I think he received a good deal more than the amount of the moneys, (other than local sums), granted for him, and at any rate this is a case of a bargain made between the trustees and teacher in which the latter virtually says: "relieve me from my contract" and "I leave it to you to say what I shall receive for the vacation," and I do not think he can, after the Board has acted upon his request in such manner as was done in the case, be permitted to recover any further amount. Judgment for defendants with costs.

GENERAL SESSIONS OF THE PEACE.

MORISON V. ASHMAN.

BIRMINGHAM V. ASHMAN.

Recognizance—Who to decide sufficiency of an appeal to sessions—Adjournment of appeal from one session to another.

[Lindsay.

Appeal to General Sessions from two convictions.

After notice of appeal moved and recognizance filed, counsel for respondents proposed to prove that the sureties were not sufficient. Counsel for appellant objected and contended that the Court to whom the appeal is made has no right to enquire into the sufficiency or insufficiency of the sureties but it was a matter wholly within the jurisdiction of the justice who took the recognizance. The learned judge allowed counsel for respondents to examine sureties and found as a fact that the sureties were not sufficient, and subsequently

DEAN, Co. J., *held*, that the justice taking the recognizance was the proper person to decide on the sufficiency of the sureties and the court appealed to had no right to enquire into the matter.

By 33 Vict. (Dom.) cap. 27, sec. 1, ss. 3, power is given to the Court if necessary from time to time by *order endorsed* on the conviction or order to adjourn the holding of the appeals from one sitting to another or others of the said Court.

The hearing of the appeals in these cases were noted in the learned judge's book and also in the clerk of the peace's book as being adjourned until the next sessions but no order was endorsed on the back of the conviction. On objection being taken that the hearing of the appeals was not properly adjourned and that the court could not proceed.

RECENT ENGLISH PRACTICE CASES.

DEAN, Co. J., *held*, relying on *Rush v. Bobcaygeon* 44 U. C. Q. B. 199, that the objection was well taken, and that he could not hear the appeals or make any order as to costs or otherwise.

Martin, & Hopkins (Lindsay), for respondents.
A. F. Sinclair (Cannington), for appellants.

ENGLAND.

RECENT PRACTICE CASES.

RE GYHON, ALLEN V. TAYLOR.

Preliminary accounts and inquiries—Rules 1883, Ord. 15 r. 1 (Ont. Rule O. 86, 87).

Under Ord. 15 r. 1. (*Ont. Rules 86, 87*) only common accounts and inquiries can be directed, and not accounts and inquiries the right to which depends on the plaintiff establishing a case for them at the hearing.

A mortgagee of shares of the proceeds of the residuary real and personal estate of a testator who died in 1872 brought an action for administration of the estate, alleging mis-application by one of the trustees of moneys raised by mortgage of parts of the testator's estate on equitable mortgage. The plaintiff applied under Ord. 15 r. 1 for common accounts in an administration suit, and also for inquiries as to mortgages of the real estate and as to advances to the trustees.

Held, plaintiff not entitled to the inquiries as to mortgages and advances to trustees.

[C. A.—29 Chy. D. 834.]

COTTON, L. J. . . . "The two special inquiries for which the plaintiff asks do not come within that description (*i.e.*, accounts and inquiries necessary in an administration suit), but point to alleged breaches of trust which ought to be determined at the hearing. These are not within the rule, and nothing could now be directed but ordinary administration accounts."

NOTE.—*Query*, how far this case is an authority for the construction of Ont. Rules 86, 87, see Chy. Ord. 220, Holmested's R. & O., p. 103.

DE LA POLE V. DICK.

Solicitor—Service of notice of appeal.

An order on further consideration was made for the payment of money by a defendant into Court: the plaintiff appealed from the order. The defendant went abroad, and notice of the appeal was served on his solicitors.

Held, that as the order appealed from had not been worked out, the defendant's solicitors still represented him, and that service of the notice of appeal on them was sufficient.

[C. A.—29 Chy. D. 351.]

COTTON, L. J.—" . . . ROLLE, C. J., lays down in *Lawrence v. Harrison*, Sty, 426, a principle on which we may act. He says: 'The only question is whether the warrant of attorney be determined by the judgment given in the suit wherein he was

retained; and I conceive it is not, for the suit is not determined, for the attorney after the judgment is to be called to say why there should not execution be made out against his client, and he is trusted to defend his client, as far as he can, from the execution.' According to that principle, until the judgment is worked out, there is a duty imposed on the solicitor on the record, to defend his client against any improper steps taken for the purpose of enforcing the judgment. Until that time, therefore, the solicitor on the record must be taken, as between him and the opposite party, to represent the client, unless the client not only discharges him, but substitutes another solicitor on the record."

BOWEN and FRY, LL.J., concurred.

GARNHAM V. KIPPER.

Preliminary accounts—Rules S. C. 1883, Ord. 33 r. 2 (Ont. R. 244).

In an action for foreclosure against several other mortgagees the plaintiff insisted she was entitled to priority to the defendants on the ground of notice and fraud. On the application of the plaintiff, under Ord. 33, r. 2 (*Ont. R. 244*), KAY, J., made an order directing an inquiry as to the priorities, and an account of the amount due to the incumbrancers.

Held, order must be discharged as Ord. 33, r. 2 does not authorize the whole questions in a cause to be tried in Chambers; but only authorizes the Court to direct before trial accounts and inquiries which would otherwise have been directed at the trial.

[C. A.—29 Chy. D. 566.]

FRY, L. J.—" . . . When questions are raised which ought to be decided at the trial they are not proper to be sent to Chambers. What the order intended was to authorize inquiries which would otherwise have been directed at the trial, to be directed before the trial."

COTTON and BOWEN, LL.J., concurred.

CARSHORE V. NORTH-EASTERN RY. CO.

Third party—Claim of indemnity—Rules S. C. 1883, Ord. 16, r. 48 (Ont. Rules 107, 108).

In giving leave to serve notice of claim for contribution or indemnity on a third party, the Court will only consider whether the claim is *bona fide*, and whether, if established, it will result in contribution or indemnity. It will not on the preliminary application determine whether the claim is valid.

[C. A.—29 Chy. D. 344.]

NOTE.—See Ont. Rules 107, 108. Under the latter Rule a defendant may serve notice of claim for contribution, etc., without leave, but the above case is an authority as to the propriety of giving such a notice, and as to the principle on which the Court would act on motion to set aside the notice.

Com. Pleas Div.]

NOTES OF CANADIAN CASES.

[Com. Pleas Div.]

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

COMMON PLEAS.

Divisional Court.]

[September 5.]

MCLEAN V. SHIELDS ET AL.

Foreign judgment—Non-resident—Absence of notice of personal application to set aside judgment—Effect of.

To an action on a foreign judgment recovered in the Court of Queen's Bench, Manitoba, against S. and L., the defendant S. set up as a defence that he was not at, or during the time the proceedings were being taken to recover the judgment, nor has he since been a resident of, or domiciled within the said Province of Manitoba, and he was not served with any process or notice of the said action, nor had he any notice whatsoever of any proceedings in said action, nor had he any opportunity of appearing in the said action and defending the same; and the said judgment was obtained in his absence and without his knowledge.

Held, following *Schisby v. Westenholz*, L. R. 6 Q. B. 155, a good defence to the action.

S., on hearing of the judgment having been obtained against him, instructed counsel to move the Court in Manitoba to have it set aside; but the application was refused on the ground that it was too late.

Held, that this did not preclude him from contesting his liability in the action herein.

Watson, for the plaintiff.

Tilt, Q.C., for the defendant.

Wilson, C.J.]

[September 22.]

FOX V. SYMINGTON.

Interpleader—48 Vict. ch. 14 sec. 6, sub-sec. 3—Protection of bailiff.

The 48 Vict. ch. 14 sec. 6, sub-sec. 3, provides that the judge of the Division Court in interpleader proceedings shall adjudicate between the parties, or either of them, and the

officers or bailiff, in respect of any damage or claim of or to damage arising or capable of arising out of the execution of the process by such officer or bailiff, and make such order in respect thereof, etc., as to him shall seem meet.

Held, this is for the protection of the officer or bailiff only.

CARSON V. VEITCH.

Assessment Act—Right to deduct taxes—Demand of taxes—Assessment, sufficiency of—Failure to distrain for taxes—Right to collect.

By sec. 21 of the Assessment Act, R. S. O. ch. 180, "Any occupant may deduct from his rent any taxes paid by him if the same could also have been recovered from the owner or previous occupant," unless there was an agreement to the contrary. By sec. 12 the assessment roll must contain, amongst other things, "Column 8, number of concession, name of street, or other designation of the local division in which the real property lies; column 9, number of lot, house, etc., in such division; column 10, number of acres or other measure shewing the extent of the property." In this case the name of the street and the measure of the property was given, but not the number of the lot, etc., except an arbitrary number adopted by the assessment department for their convenience; and it appeared that a person would be unable by looking at the roll, without making enquiries, to discover the property. Prior to the defendant's entry, B. was assessed as owner and had received for the three prior years a notice of assessment or assessment slip similar in form to the assessment herein. The only demand here was the leaving of the assessment slip. In an action for an illegal distress for rent, the plaintiff claimed that no rent was due by reason of his having paid the taxes,

Held, that sec. 21 does not authorize the occupant to voluntarily pay the taxes; but that he can only deduct same when they can be recovered from him and also from the owner; and as under *Chamberlain v. Turner*, 31 C. P. 460, which was followed and adopted, there was no legal demand (as required by sec. 92) upon which a distress could have been founded, there was no legal claim to pay the taxes and therefore to deduct them from the rent.

Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

Quare, as to the sufficiency of the assessment.

Quare, also whether, where there is a sufficient distress upon the property, and the municipality by its own laches puts it out of its power to distrain, sec. 100 applies so as to give the right to collect by action.

J. Reeve, for the plaintiff.

Bigelow, for the defendant.

PRACTICE.

Court of Appeal.]

[May 12.]

PAWSON ET AL. V. MERCHANTS' BANK ET AL.

Equalizing business—Rule 545, O. J. A.—Transferring actions—Jury notices—Exclusive jurisdiction of chancery.

Held, that Rule 545, O. J. A., was not intended to interfere with the power of transferring actions from one Division of the High Court to another, nor with the right to give a jury notice in a proper case, nor with the existing modes of trial of particular actions, nor is that its effect upon its true construction.

Held, also, that it does not amend, modify, or repeal section 45, O. J. A.

Held, also, that the exclusive jurisdiction of the Court of Chancery in section 45 means its jurisdiction as exercised generally in dispensing equity, and not its exclusive, as distinguished from its auxiliary jurisdiction.

The action was brought on behalf of the plaintiff and other creditors to set aside an alleged fraudulent transfer of notes, etc., made to his co-defendants by the debtor, and for an injunction to restrain the defendants from negotiating them. The defendants served a jury notice, which *PROUDFOOT, J.*, struck out.

Held, that this was such an action as would, before the O. J. A., have been within the exclusive jurisdiction of the Court of Chancery, and therefore it fell within section 45, and should be tried without a jury.

The practice as laid down in *Bank of B. N. A. v. Eddy*, 9 P. R. 468, is still the proper practice.

The question whether the order of *PROUDFOOT, J.*, was appealable was not determined, as the appeal was dismissed.

Robinson, Q.C., Hoyles and Wallace Nesbitt, for the appellants.

Shepley, for the respondents.

Rose, J.]

[June 19.]

HAY V. PATERSON.

Ca. sa.—Execution—R. S. O. ch. 69.

A defendant arrested and imprisoned under a *ca. sa.* is a debtor in close custody in execution within the meaning of R. S. O. ch. 69.

Shepley, for the plaintiff.

Waller Read, for the defendant.

Mr. Dalton, Q.C.]

[Sept. 9.]

LONDON AND CANADIAN L. AND A. CO.
V. MORPHY.

Action in High Court—Interpleader issue sent to County Court—Order postponing trial, where made—44 Vict. ch. 7, sec. 1 (O.).

Where an order made in an action in the High Court of Justice directs the trial of an interpleader issue in a County Court, all proceedings from the completion of the order sending the issue to the County Court until final judgment must, by the provisions of 44 Vict. ch. 7, sec. 1, O.) be taken in the County Court.

A motion made in Chambers in the High Court of Justice to postpone the trial of an issue so directed was refused without costs.

G. W. Meyer, for the motion.

Mr. Bristol, Howland, Arnoldi & Ryerson, contra.

Chy. Div.]

[Sept. 11.]

HICKEY V. STÖVER.

Divisional Court—Appeal—Time expired—Rules 522 and 523, O. J. A.

The defendant desired to appeal to the Chancery Divisional Court from the judgment at the trial pronounced on the 19th June, 1885. The judgment was not drawn up and settled till after Long Vacation, when it was too late by Rule 522, O. J. A. to set the cause down for the sitting of the Divisional Court, beginning on the 3rd Sept., 1885. Rule 523, however, required the application to the Divisional Court to be made at the first sittings, which begins not less than ten days after the pronouncing of the judgment.

Held, that the time for appealing began to run from the 19th of June, and, notwithstanding the regulation that no cause is to be set

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

down for hearing by the Divisional Court, until the judgment in appeal is drawn up and settled, that the neglect to draw up the judgment did not extend the time for appeal.

But, as there was a *bona fide* intention of appealing, instructions had been given, the defendant lived in Texas, the judgment was complex, and the defendant had only twelve days exclusive of vacation to have it settled and the case entered, leave to appeal was granted on payment of costs.

J. MacLennan, Q.C., for the defendant,
Matthew Wilson, for the plaintiff.

Mr. Dalton, Q.C.]

[Sept. 11.]

RADMORE V. ELLIOTT.

Money paid into Court by defendant—Retaining money in Court—Rules 215 and 217, O. J. A.

The defendant paid money into Court in part satisfaction of the plaintiff's claim under Rule 215 O. J. A.; but also disputed part of the plaintiff's claim. The defendant then applied under the words in Rule 217, "unless otherwise ordered by a judge" to have the money so paid in retained in Court to abide the event of the action, alleging that, if he succeeded in his defence, he could not recover costs from the plaintiff who was, he alleged, insolvent.

Held, that this would be in effect ordering security for costs, and the motion was refused, Shepley, for the motion.

Haverson, contra.

O'Connor, J.]

[Sept. 14.]

SCOTT V. WYE ET AL.

Married woman—Judgment—R. 80, O. J. A.—47 Vict. ch. 19, O.

Held, that the "Married Women's Property Act, 1834" (47 Vict. ch. 19, O.) is not retrospective.

A motion under Rule 80, O. J. A. for judgment upon a promissory note against a married woman was dismissed in April, 1883, and was now renewed, fourteen months after the passing of the Act of 1884.

Held, that that Act made no change in the law which could assist the plaintiff, even if the matter were *res integra*.

Turnbull v. Forman, 15 Q. B. D. 234, followed.
W. H. P. Clement, for the motion.

J. F. Smith, contra.

Ferguson, J.]

[Sept. 14.]

ROSS V. CARSCALLEN.

Setting aside judgment—Trial—Judge in Court at Toronto—Rule 270, O. J. A.

When the action came on for trial at Chat-ham the plaintiff together with his counsel and witnesses was absent, and the judge presiding at the trial pronounced judgment for the defendant.

Held, that the same judge had power under Rule 270, O. J. A., when sitting afterwards as the Court at Toronto, to set aside the judgment at the trial.

Hilliard v. Arthur, 10 P. R. 281, distinguished.
Raymond, for the plaintiff.

Moss, Q.C., for the defendant.

Mr. Hodgins, Q.C.]

[Sept. 18.]

Ferguson, J.]

[Sept. 21.]

RE ROGERS, ROGERS ET AL. V. ROGERS ET AL.

Master's office—Jurisdiction—Reference under order of Master-in-Chambers—Disputed lease—Fraud—Trial of issue—Rule 256, O. J. A.—Who should be plaintiff?

Held, that on a reference for partition or sale of lands directed by the Master-in-Chambers, the Master-in-Ordinary had no jurisdiction to try the question of the validity of a lease under seal from the intestate, set up as a ten years' lease by one of the heirs-at-law, who claimed that the lands should be sold subject to his lease; some of the other heirs-at-law disputing the validity of the lease, and alleging that it was either a five years' lease or that there had been a fraudulent alteration of the sealed instrument, there being an alteration in a material part apparent on the face.

The reference was adjourned till after the trial of the question raised, and an issue was directed by a Judge in Chambers, under Rule 256, O. J. A., to be tried at the next sitting for the trial of actions in the Chancery Division; the lessee to be plaintiff in the issue.

CORRESPONDENCE.

Shepley, for the plaintiff and lessee.
7. Hoskin, Q.C., for the infant defendant.
E. B. Brown, for the defendants who disputed the lease.

Ferguson, J.] [Sept. 19.]

RE LEWIS, JACKSON V. SCOTT.

Disputed will case—Trial by jury—Heir-at-law—Exclusive jurisdiction of Chancery—Character of issues.

The heir-at-law, in an action where he disputes the will, has not now an absolute right to a trial by jury in this Province.

An action to establish a will removed from a Surrogate Court to the Court of Chancery is one over which the Court of Chancery had, at the time of the passing of the O. J. A., exclusive jurisdiction, and a motion to the Court to have the issues in such an action tried by a jury is included in the practice mentioned in sec. 45, O. J. A.

Issues raised on the following pleas, viz.: that the will was not executed in due form, that the testator was not of sound mind, undue influence, fraud, that the testator was labouring under certain delusions, were *held* not of such a character that they should be sent to be tried by a jury.

W. H. P. Clement, for the defendant.

Holman, for the plaintiff.

Mr. Dalton, Q.C.] [October 2.]

BRYCE, McMURRICH & CO. V. SALT.

Judgment—Indian—C. S. C. ch. 9—Indian Act, 1880 (D.).

An order was granted under Rule 80 for judgment against an Indian living with his tribe on their reserve, and not being the holder of any real or personal property outside the reserve.

Held, that since the repeal of C. S. C. ch. 9, there is nothing to prevent an Indian suing and being sued, although, by the Indian Act of 1880, sec. 77 (D.), the judgment will not bind any property of the Indian except that described in sec. 75.

Urquhart, for the plaintiffs.

Holman, for the defendant.

CORRESPONDENCE.

ULTRA VIRES.

To the Editor of the LAW JOURNAL:

SIR,—Of necessity there have arisen within the short period of eighteen years a considerable number of very important constitutional questions affecting the welfare and good government of our young Dominion. Not only have there been many decisions of the Courts of final resort both in Canada and England, interpreting different parts of our constitution, but there have been several books written—some very learned and some not remarkably so—in which more or less light has been thrown on the difficult questions involved.

The motto on the title page of the "Letters on the Federal Constitution by the Hon. Mr. Justice T. J. J. Loranger," *Si vis pacem, para bellum* taken along with the tone which one finds pervading the whole, sufficiently indicates the standpoint from which he has written, viz.: that of a French-Canadian extremely zealous for his country, which is not Canada, but Quebec, and alarmed for the permanence of "*nos institutions, notre langue, et nos lois*." Hence his conclusions are in some respects rather consonant with what he, in common with most Liberals, thinks ought to be the constitution on this or that point than with the result of a critical judicial analysis of the language of the British North America Act itself.

A more pretentious work has appeared somewhat later, whose author, on the other hand, exhibits on every page an overweening conceit and in many a too manifest desire to cut down the powers of the local legislatures. Look at the motto on his title page: "Of course, recognizing as I do that the bishop possesses a discretion in this matter, I must fully admit that he is vastly more capable of exercising it well than I am. But the way he does exercise it is subject to criticism, even by those less competent than himself, in the same way as the opinion and sentences of this Court may and ought to be and are criticised by laymen." *Per Bramwell, L.J.*, in *Reg. v. Bishop of Oxford*, L. R. 4 Q.B.D., 556, in Court of Appeal of England. It serves to indicate the spirit in which the author has approached the consideration of the points involved all through the work. Without having one tenth part of Lord Bramwell's attainments as a jurist or any fraction of Lord Bramwell's modesty and deference, he undertakes to sit in appeal from, to ridicule and then to try and cut up the judgments and decisions of the highest authorities, both in Canada and England, always excepting

CORRESPONDENCE.

those of the present Chief Justice of the Supreme Court whom he goes out of his way often to bespatter with fulsome adulation. His pages too, are full of turgid involved periods, wearisome redundancy and badly constructed sentences. In fact his composition is far worse than his ideas, which to do him justice are in many branches of the subject, in my opinion, very clear and correct; and, notwithstanding the serious and numerous faults in the work, there can be no doubt that its arguments are often cogent and convincing and its conclusions sound. That Mr. Travis has not only written from the standpoint of a Federalist in the sense in which Mr. Justice Lorranger uses that term, but that he has also written as an *advocate* for maintaining the paramount power of the Dominion Parliament as against the power of the Provincial Parliament must be quite clear to any impartial reader of his book.

To be a good, judge a man, who being a Tory or Grit but yesterday, and notwithstanding his elevation to the bench, still feeling strong sympathy with one or other of those great parties, must sink his party sympathies entirely, and must be able to decide between man and man or between Province and Dominion, entirely unaffected by his former feelings and associations, and so with the author who undertakes to give the public the proper interpretation of so all-important a statute as the one before us. As for myself I am confident that what follows, whether it shall be sound or unsound reasoning, whether the conclusions at which I have arrived are correct or erroneous, will at all events be far from any political bias and the result of the best considerations which my poor powers are capable of.

The readers of the LAW JOURNAL need not be afraid that I am going to write a book on this subject. My idea is merely to discuss briefly a few of the questions that have come up, not in any scientific or set order, but just as they occur, or as I may have the presumption to think I can throw some light upon them. For example: take the much-debated problem of the proper limitations of the jurisdiction of the respective Parliaments upon subjects excepted out of a larger class of subjects.

"Marriage" is a subject assigned to the Dominion. "The solemnization of marriage in the Province" is assigned to the Province. Mr. Travis contends that the Dominion can make a general law respecting marriage, which would affect the solemnization of marriage in every Province, and that thereafter no Provincial Legislature could legislate so as to repeal the Dominion law on the subject. This is an instance of his excessive zeal for the maintenance of the paramount power of the Dominion and in this in my opinion he is clearly wrong. There

is a clear principle by which this question can be decided and I will state it a little further on.

The subjects of "Property and Civil rights in the Province" are assigned exclusively to the Provincial Legislature, but "Bankruptcy and Insolvency," "Copyrights," "Patents of Invention," "The regulation of trade and commerce," "Weights and Measures" and other subjects which are all branches or sub-classes of the general subject of "Property and Civil rights" are assigned exclusively to the Dominion.

The Dominion Parliament can undoubtedly legislate effectually on all these sub-classes and its jurisdiction occupies their whole territory, so to speak, and the local Legislature cannot in any manner trench upon them.

These two examples will suffice to illustrate my principle, which is this, that when a general subject is given to either Legislature, and an exception or sub-class is taken out of it and given to the other Legislature, the authority of the latter is supreme and exclusive within that excepted class. Therefore the Dominion can in no way legislate to affect the solemnization of marriage in any Province. A portion of territory is as it were fenced off and the Dominion, whilst it may roam unchallenged over the rest of the territory, must not encroach on this in any way whatever.

"Marriage and Divorce" are themselves parts of the larger class of "Civil Rights in the Province" and so the Provincial Legislature must be careful not to trench upon them in any way.

"The criminal, law except the constitution of Courts of criminal jurisdiction," is assigned to the Dominion, and so the constitution of such Courts is a subject within the absolute control of the Province, and no matter how much the Dominion may legislate upon criminal law and criminal procedure, it is powerless to enact one word which shall affect the constitution of the Courts. By legislating on Bankruptcy and Insolvency or Interest or Patents, the Dominion necessarily legislates respecting property and civil rights in the Province, but that does not matter, the former being exceptions carved out of the general subject of property and civil rights.

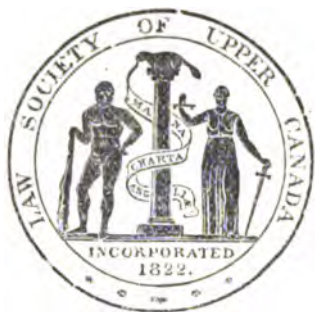
If this principle is applied to the determination of other points similarly arising, I think it will be found to furnish a safe rule and one which is consistent with what our friend Mr. Travis is pleased to refer to so frequently as the "well-decided cases." I hope to be able in future numbers to point out some of the statutes of the respective Parliaments which in my opinion are *ultra vires* and to give my reasons for so thinking.

Winnipeg.

GEORGE PATTERSON.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1885.

During this term the following gentlemen were called to the Bar, namely:—

Messrs. Donald Malcolm McIntyre, with honours and gold medal; Robert Smith, John Macpherson, William Edward Middleton, John Tytler, Robert William Evans, Robert Victor Sinclair, Ernest Joseph Beaumont, James Redmond O'Reilly, George Eldon Kidd, James Chisholm, Robert Ormiston Kilgour, William Avery Bishop, Francis Gilbert Lilly, Donald Macdonald, William Beardsley Raymond, Christopher Conway Robinson, Charles Creighton Ross, John Thomas Sproule, Arthur Byron McBride. These names are arranged in the order in which the candidates appeared before Convocation for call.

The following candidates were admitted as students-at-law, namely:—

Graduates—Alexander Gray Farrell, William Henry Williams, Herbert Read Welton.

Matriculants—Samuel Storm Martin, James Henry Cooper.

Juniors—J. A. Fleming, W. G. Richards, R. M. Graham, J. P. Dunlop, W. G. Green, J. D. Lamont, C. Stiles, J. H. Denton, W. J. Whiteside, S. B. Arnold, W. Kennedy, J. R. Layton, W. L. Hatton, W. J. Williams, H. Armstrong, H. W. Ross, R. G. Pegley, A. H. Wallbridge, M. K. Cowan, J. J. Drew, M. Murdoch, G. H. Muntz, C. E. Lyons and F. C. Hastings.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885. { Arithmetic,
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884. { Cicero, Cato Major.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
1885. { Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George II inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous les toits

1885—Emile de Bonnechose, Lazare Hoche.

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OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law, Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Kent's Equity Jurisprudence; Theobald on Wills; Hart's Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are waived.

A graduate in the Faculty of Arts, in any University in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission to the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchers, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S.

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
1887.	Homer, Iliad, B. VI.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
1888.	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
1889.	Cæsar, B. G. I. (vv. 1-133).
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Xenophon, Anabasis, B. II.
1890.	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem :—

1885—Coleridge, Ancient Mariner and Christ-abel.

1887—Thomson, The Seasons, Autumn and Winter.

1898—owper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Child Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek :—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886 }
1888 } Souvestre, Un Philosophe sous le toits.

1890 }
1887 } Lamartine, Christophe Colomb.
1839 }

OR, NATURAL PHILOSOPHY.

Books—Arnett's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe. Elements of Book-Keeping. ✓

Copies of Rules can be obtained from Messrs. Rowell & Hutcheson

Canada Law Journal.

VOL. XXI.

OCTOBER 15, 1885.

No. 18.

DIARY FOR OCTOBER.

17. Sat.....County Court and Surrogate Term (York) end.
18. Sun.....20th Sunday after Trinity.
21. Wed.....Battle of Trafalgar, 1805.
23. Fri.....Lord Monck, Gov.-General, 1861. Lord Lans-
downe, Gov.-General, 1883.
24. Sat.....Sir J. H. Craig, Governor-General, 1897.
25. Sun.....21st Sunday after Trinity. Battle of Balaklava,
1854.
27. Tues.....Sittings of Sup. Court. Primary Examinations.
28. Thur.....Graduates seeking admission to Law Society to
present papers.
31. Sat.....Hallow E'en.

TORONTO, OCTOBER 15, 1885.

A CORRESPONDENT calls attention in language apparently none too strong to an act of the Ontario Legislature passed last session in the interests of the lumbermen on the Ottawa. If there is any explanation to be given for such exceptional legislation it would be well that it should be given. At present it has a very fishy appearance.

RECENT ENGLISH DECISIONS.

The *Law Reports* for September comprise 15 Q. B. D. pp. 313-402, and 29 Chy. D. pp. 749-892.

NEGLECTANCE—VENDOR CONSIGNING GOODS IN DEFECTIVE TRUCK—LIABILITY OF VENDOR TO SERVANT OF VENDOR.

Taking up first the cases in the Queen's Bench Division, we have the decision of a Divisional Court composed of Grove and Smith, JJ., in *Elliott v. Hall*, 15 Q. B. D. 315, which was an action brought to recover damages for injuries sustained by the plaintiff through the negligence of the defendant. The circumstances of the case were these: the defendant was a colliery owner, and consigned coals to the plaintiff's master in a truck rented by the defendant from a waggon company. Through the negligence of the defendant's servants, the truck was allowed to leave the

colliery in a defective state. In consequence of the defect in the truck, injury was occasioned to the plaintiff who was employed by the consignee in unloading the coals and had got into the truck for that purpose. The Court held that the defendant was liable. The principal point in the case is thus stated by Grove, J.:

"It is contended that there is no duty because there was no contract with the plaintiff; but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves, and that their servants would do so. Under these circumstances it seems to me clear that there was a duty not to be guilty of negligence with regard to the state and condition of the truck."

LARCENY BY INFANT BAILEE.

A very full Court, composed of Coleridge, C.J., and Cave, Day, Smith and Wills, JJ., were called upon to determine in the *Queen v. McDonald*, 15 Q. B. D. 323, whether an infant over fourteen years, who had fraudulently converted to his own use goods which had been delivered to him by the owner under an agreement for the hire of the same, could be guilty of larceny. The contention for the prisoner was that the offence depended on the existence of a contract of bailment; that being an infant he could not make such a contract, and could not therefore be guilty as a bailee under the Imp. Stat. 24 & 25 Vict. c. 96, s. 3 (see 32 & 33 Vict. c. 21, s. 3, D.), and he could not be guilty at common law, because the owner had given him legal possession of the goods. But the Court were unanimously of opinion that to constitute him a bailee within the meaning of the statute it was unnecessary that he should be able to bind himself by a contract of bailment. The fact that there is usually a contract, express or implied, to restore the goods bailed, they held, was not of the essence of bailment, which simply consists in the delivery of an article upon a trust or condition; but rather a contract that arises out of the bailment, and that an infant might be a bailee, though not bound by any contract, express or

RECENT ENGLISH DECISIONS.

implied, to restore the goods bailed. As Lord Coleridge put the case:—

"He is guilty of the offence, not because he has broken a contract which he was incapable of making, but because, being capable of becoming a bailee of these goods, and having become one, he dealt with the goods in such a manner as, by the terms of the Act, to render him guilty of the crime of larceny."

Doubts having been raised as to the correctness of this decision, the case was subsequently re-argued before Lord Coleridge, Grove and Denman, JJ., Pollock, B., Field, J., Huddleston, B., Manisty, Hawkins, Mathew, Cave, Day, Smith, and Wills, JJ., when it was announced that a majority of the judges were of opinion that the conviction was right.

MORTGAGE—FIXTURES—DRIVING BELT OF MACHINERY.

In *Sheffield v. Harrison*, 15 Q. B. D. 358, the Court of Appeal, approving *Longbottom v. Berry*, 5 Q. B. 123, held that a leather belt used for driving machinery on mortgaged property was part of the machinery, which, as fixtures passed, to the mortgagee, without the necessity of his registering any bill of sale.

AGENT BETTING FOR PRINCIPAL—ACTION BY PRINCIPAL TO RECOVER FROM AGENT MONEY WON BY BETTING.

The Court of Appeal in *Bridger v. Savage*, 15 Q. B. D. 363, while affirming Coleridge, C.J., overrule *Beyer v. Adams*, 26 L.J., Chy. 841, and hold that when a man employs another to bet for him, and the agent accordingly bets and wins, and receives the money, the principal may recover from the agent the money so received, notwithstanding that, by Impl. Stat. 8 & 9 Vict. c. 109 sec. 18, all contracts by way of wagering are null and void. The ground of the decision is thus stated by Bowen, L.J.:—

"Now with respect to the principle involved in this case, it is to be observed that the original contract of betting is not an illegal one, but only one which is void. If the person who has betted pays his bet he does nothing wrong; he only waives a benefit which the statute has given him, and confers a good title to the money on the person to whom he pays it. Therefore when the bet is paid the transaction is completed, and when it is paid to an agent it cannot be contended that it is not a good payment for his principal. If not, how monstrous it would be that the agent who has received money which belongs to his principal, and which he received for his principal, and only on that account, should be allowed to say that the

payment was bad and void. The truth is that the contract under which he received the money for his principal is not affected by the collateral contract, under which the money was paid to him."

The rule, therefore, is established by this case, that when an agent receives money for his principal under a void contract, he cannot set up the invalidity of the contract under which the money was paid, as a defence to an action by the principal for the money so had and received.

MARINE INSURANCE—CONCEALMENT BY INSURER OF A MATERIAL FACT.

Tate v. Hyslop, 15 Q. B. D. 368, is an important decision by the Court of Appeal, affirming the judgment of a Divisional Court of the Queen's Bench Division, on a question of mercantile law. The action was brought to recover on certain policies of marine insurance. At the time of effecting the insurance, which included risks to crafts and lighters, it was known to the plaintiff that the underwriters charged a higher rate of premium when the insurance was "without recourse to lightermen" (which meant where the lighterage was to be done on the terms that the lightermen were not to be liable as common carriers, but only for negligence) than they charged when there was such recourse, and the lightermen were liable as common carriers. At the time of effecting the insurance the plaintiff had an arrangement with a lighterman to do all the plaintiff's lighterage on the terms that he was only to be liable for negligence. This arrangement the plaintiff did not communicate to the underwriter. The loss occurred whilst the goods insured were on the lighters. The question for the Court was whether the concealment of the arrangement with the plaintiff's lighterman invalidated the policy; and the Court held that it did. The rule of law on which the Court proceeded is thus laid down by Bowen, L.J.:—

"It is established law that a person dealing with underwriters must disclose to them all the material facts that are known to himself and not to them, or, at all events, are facts which they are not bound to know. What are material facts has been defined by authority. It is the duty of the assured to communicate all facts within his knowledge which would affect the mind of the underwriter at the time the policy is made, either as to taking the contract of insurance, or as to the premium on

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which he would take it. The materiality of the fact depends upon whether or no a prudent underwriter would take the fact into consideration in estimating the premium, or in underwriting the policy. The rule has been laid down over and over again and is to be found in *Ionides v. Pender*, 9 Q. B. 531, and other cases."

PRINCIPAL AND AGENT—CUSTOM OF STOCK EXCHANGE
CONFLICTING WITH STATUTE.

The only remaining case to be noticed in the Queen's Bench Division is that of *Perry v. Barnett*, 15 Q. B. D. 388, a decision of the Court of Appeal. The action was brought by a broker to recover the price of certain bank shares purchased at the defendant's request. The plaintiffs were stock-brokers, living at Bristol, and the defendant had instructed them to purchase for him shares in the Oriental Bank, a joint stock banking company, on the London Stock Exchange. The plaintiffs gave directions accordingly to their London agents, brokers on the London Stock Exchange, who purchased the shares in the usual way, without having in the contract the distinguishing numbers of the shares specified, as required by the Impl. Stat. 30 & 31 Vict. c. 29, which invalidates contracts not complying with this provision, there being a custom on the London Stock Exchange to disregard the provisions of that Act; but of this custom the defendant was ignorant. By the rules of the Stock Exchange, the Stock Exchange does not recognize in its dealings any other persons than its own members, who are liable to be expelled if they do not carry out contracts, and no application to annul a contract can be entertained by the committee of the Stock Exchange—unless upon a specific allegation of fraud or wilful misrepresentation. Before the settling day the Oriental Bank closed its doors, and the defendant repudiated the contract; but the committee of the Stock Exchange refused to annul the contract and, therefore, the plaintiffs completed it, and paid the price of the shares. The defendant did not know that, by the usage of the Stock Exchange, the purchasing broker was bound to perform a contract for the purchase of bank shares though void at law. Under the above-mentioned Act, Bowen, L.J., at p. 397, says:—

"The question is narrowed to this. Is a man who employs a broker to deal in a particular market bound to know a usage there to make an

invalid, instead of a valid contract, and a usage, according to which, when he has ordered one thing he is expected to take another thing? It would not be reasonable, I think, to hold that a person is bound by such a usage, unless beforehand he was told or had knowledge of it. Such a usage, when applied not to brokers, but to strangers who are ignorant of it, is inconsistent with the contract of employment."

COVENANTS RUNNING WITH LAND—ROAD—DEDICATION.

Turning now to the cases in the Chancery Division we come to *Austerberry v. Oldham*, 29 Chy. D. 750, a decision of the Court of Appeal, which, although it turns to some extent on statutes of merely local operation, nevertheless also establishes a principle of sufficient general interest to warrant a notice of it in these columns. One A. by deed conveyed for value to trustees in fee a piece of land as part of the site of a road, intended to be made and maintained by the trustees, under the provisions of a contemporaneous trust deed (being a deed of settlement for the benefit of a joint stock company, established to raise the capital for making the road); and in the conveyance the trustees covenanted with A., his heirs and assigns, to make the road, and at all times keep it in repair, and allow the public to use it subject to the payment of tolls. But A. and his assigns were to have free use of the road. The piece of land so conveyed was bounded on both sides by other lands of A. The trustees made the road and afforded access to A.'s adjoining lands. A. afterwards sold his adjoining lands to the plaintiff, and the trustees sold the road to the defendants, a municipal corporation, both parties taking with notice of the covenant to repair. The defendants' corporation declared the road in question a public highway, and by virtue of an Act of Parliament the same thereby became "a highway repairable by the inhabitants at large," and the defendants claimed to assess the plaintiffs for sewerage, draining, and paving the road. The plaintiff brought the action against the corporation and trustees, claiming a declaration that they were not entitled to recover from the plaintiff any sum for keeping the road in good repair, and to restrain the defendant corporation from enforcing payment; or, in the alternative, a declaration that the trustees should indemnify the plaintiff out of the purchase money they had received against the charges for keeping

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the road in repair. It will thus be seen that one of the principal questions raised was as to the effect of the covenant to repair the road contained in the original conveyance, and how far it was binding upon the subsequent owners of the land reserved, and of the roadway respectively. The Court were unanimously of opinion that the covenant to repair did not run with the land and did not bind the subsequent owners of the roadway, nor was the plaintiff as owner of the adjoining land entitled to enforce it. Cotton, L.J., says, at p. 773 :—

" . . . Undoubtedly where there is a restrictive covenant, the burden and benefit of which do not run at law, Courts of Equity restrain any one who takes the property with notice of that covenant from using it in a way inconsistent with the covenant. But here the covenant, which is attempted to be insisted upon on this appeal, is a covenant to lay out money in doing certain work upon this land; and that being so in my opinion—and as the Court of Appeal has already expressed a similar opinion in a case which was before it—that is not a covenant which a Court of Equity will enforce; it will not enforce a covenant not running at law when it is sought to enforce that covenant in such a way as to require the successors in title of the covenantor to spend money, and in that way to undertake a burden upon themselves."

The plaintiff's action was therefore dismissed against all the defendants.

MORTGAGE—FUND IN COURT—PRIORITY—STOP ORDER.

The case of *Re Holmes*, 29 Chy. D. 786, is a decision of the Court of Appeal affirming Bacon, V.-C., and was a contest for priority between two encumbrancers on a fund in Court; the second encumbrancer took his encumbrance with notice of a prior encumbrance; he, however, obtained a stop order against the fund, which the first encumbrancer did not. It was nevertheless held, that the second encumbrancer was not entitled to priority.

PRINCIPAL AND AGENT—DIRECTOR—MISFEASANCE.

The decision of the Court of Appeal in *Re Cape Breton Co.*, 29 Chy. D. 795, may be read in connection with the recent case in our own Court of Appeal of *Beatty v. North-West Transportation Co.*, 11 App. R. 205. In 1871 F. and five other persons purchased certain coal areas for £5,500, which were conveyed to G. as trustee for them without disclosing the trust. In 1873 a company was formed for the pur-

pose of purchasing these areas and other property. F. was one of the directors, and as such he concurred in effecting a purchase from G. for £12,000 cash and £30,000 in fully paid-up shares, without disclosing that he, F., was a part owner. In 1875 the company was ordered to be wound up. In 1878 two schemes were submitted to a meeting of contributories, one for repudiating the purchase of the coal areas, and the other for adopting the purchase and selling the property. The latter scheme was adopted, and the property was sold at a heavy loss. A contributory then took out a summons to make F. liable for misfeasance as a director in allowing the company's seal to be affixed to the contract for purchase from G. Pearson, J., dismissed the application, holding that though the company would have been entitled to rescind the contract, yet as rescission had become impossible no relief could be given against F. That as F. when he purchased was not a trustee for the company, he could not be treated as having purchased on behalf of the company at the price he gave, and, therefore, was not chargeable with the difference between the price at which he bought and the price paid by the company; and that he could not be charged with the difference between the price paid by the company and the value of the property when the company bought it, as that would be making a new contract between the parties. Cotton and Fry, LL.J., agreed in affirming this decision, but Bowen, L.J., dissented. Cotton and Bowen, LL.J., are not very clear as to whether they treat the relation existing between a director and shareholders as that of trustee and *cestui que trust*, or principal and agent. Fry, L.J., plainly asserts the relation to be that of principal and agent, as do Burton and Osler, JJ.A., in *Beatty v. North-West Transportation Co.* Fry, L.J., says, at p. 812 :—

" I think that the case is one in which the adoption of the contract by the principal puts an end to any further rights against the agent. It appears to me that to allow the principal to affirm the contract, and after the affirmation to claim, not only to retain the property, but to get the difference between the price at which it was bought and some other price, is, however you may state it, and however you may turn the proposition about, to enable the principal, against the will of his agent, to enter into a new contract with the agent, a thing which

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is plainly impossible, or else it is an attempt on the part of the principal to confiscate the property of his agent, on some ground which, I confess, I do not understand."

Dealing with the claim to recover the profits as having been made surreptitiously, he says:—

"It appears to me that the answer to that is this, that whatever the profits are, and however they are to be measured, those profits result, not from the original contract, but from the affirmation of the contract by the principal, and that therefore the profits which are made by the agent are neither clandestine nor surreptitious."

BILL OF EXCHANGE—SPECIFIC APPROPRIATION OF GOODS—STOPPAGE IN TRANSITU.

In *Phelps v. Comber*, 29 Chy. D. 813, we have a decision of the Court of Appeal affirming the judgment of Bacon, V.-C., on a question of mercantile law. A firm at Pernambuco received orders from persons there, to purchase goods in New York. They instructed a Liverpool firm to procure the goods, and the Liverpool firm employed B. as their agent at New York. B. purchased the goods and shipped them to Pernambuco, and sent the bills of lading to the firm there, and he drew bills on the Liverpool firm to pay for the goods, but not for the precise amounts of the shipments. B. advised the Liverpool firm of the bills, and with the advice forwarded a statement of his account. To each bill was attached a counterfoil headed, "Advice of draft," and containing particulars of the bill with the words, "Against shipments per (naming the vessel) please protect the draft as advised above." The Liverpool firm accepted the bills and detached the counterfoils which they retained. The plaintiffs were holders of the bills for value. On the 10th June, 1879, the Liverpool firm having stopped payment, B. telegraphed the Pernambuco firm, "Having pledged documents and shipments (naming vessel) hold proceeds for P. & Co. (the plaintiffs)." The ship arrived on the 11th, but the bills of lading had been previously delivered to the purchasers of the goods. The plaintiffs brought the action against the Pernambuco firm, claiming to have the bills paid out of the proceeds of the goods, as having been specifically appropriated to meet the bills, and also relying on the telegram as amounting to a stoppage *in transitu*. But Bacon, V.-C., held that there had been no specific appropriation of the goods to the pay-

ment of the bills, and that the telegram was not effectual to stop the goods *in transitu*, and the Court of Appeal affirmed this conclusion, distinguishing the case from *Frith v. Forbes*, 4 D. F. & J. 409, on the ground that the memorandum attached to the bills was not sent to the consignees of the goods, and the Court of Appeal adopt the language of James, L.J., in *Robey v. Ollier*, L. R. 7 Chy. 698, where he says:—

"I am not prepared to say that merely because a bill of exchange purports to be drawn against a particular cargo it carries a lien on that cargo into the hands of every holder of the bill."

The telegram was held to indicate no intention on the part of B. to stop the goods *in transitu*, but merely a direction to deal with the proceeds, which he had no right to give.

ALTERATION OF ORDER AFTER ITS ISSUE.

Blake v. Harvey, 29 Chy. D. 827, which involves a question of practice, is a decision of the Court of Appeal, reversing Kay, J. A motion having been made before a chief clerk, who occupies a position somewhat analogous to that of our Master in Chambers, he pronounced the usual order for an account and foreclosure. The defendants objected to the direction for foreclosure, and the plaintiff assenting, the order was drawn up for an account only, and was passed and entered in that form. When the parties came before the chief clerk to proceed with the reference, he refused to proceed, because the order was not drawn up as he had pronounced it, and subsequently the registrar, at the instance of the chief clerk, without any order or summons, altered the order by adding the usual direction for foreclosure. The defendants then moved to strike out the additions. Kay, J., held the order wrong in either form, and stayed all proceedings under the order as altered, and gave the plaintiff leave to make further application to a judge in chambers for a proper order. The defendants appealed, and the appeal was allowed. Fry, L.J., says:—

"I think the course taken as to this record was entirely irregular. The records of the Court ought not to be altered, except in the manner provided in the Rules. Mr. Justice Kay thought he should do justice by staying proceedings under the order, but as the record was altered in an unauthorized way, the right course, in my opinion, would have been to

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direct it to be restored to its proper form by striking out the unauthorized additions which we now do."

WILL—CONSTRUCTION—"SURVIVING."

The Court of Appeal, in *Re Benn, Benn v. Benn*, 29 Chy. D. 839, were called on to determine the proper construction of a will whereby a testator devised to each of his children an estate for the life of that child, with remainder to the children of that child; and in case any or either of the testator's children should die without leaving any child or children, him, her or them surviving, then the estate to which their child or children respectively would have been entitled under the will if living, were devised to the testator's *surviving* children for their respective natural lives, and after their deceases their respective shares were devised to their respective children. There was no gift over on the death of all the testator's children without leaving issue. C., one of the testator's children, died without leaving issue. Some of the other children survived him, others had died leaving children living at C.'s death. The question was whether the brothers and sisters of C., who actually survived him, and their respective children were alone entitled to his share, or whether the children of the brothers and sisters who had predeceased him were also entitled to participate in it. Kay, J., held that the word "surviving" must be construed literally, and that therefore only the brothers and sisters who actually survived C. and their children were entitled, and this conclusion was confirmed by the Court of Appeal.

BILL OF EXCHANGE—SPECIFIC APPROPRIATION OF GOODS FOR PAYMENT OF BILL.

Brown v. Kough, 29 Chy. D. 848, to which we now come, is a decision of the Court of Appeal. The question involved in it is somewhat similar to that discussed in *Phelps v. Comber*, which we have noted *ante*, p. 349. A bill of exchange on its face contained a direction "to charge the same on account of cheese per *Britannic* and lard per *Greece* as advised;" the drawers, on the same day as the bill was dated wrote to the drawee a letter of advice enclosing bills of lading for the cheese and lard, and informing the drawee that as against these they had drawn on him in favour of the payee at sixty days' sight. The drawers having suspended payment the drawee refused to accept the bill; but

on the arrival of the consignments in England the drawee took possession of, and realized them, and claimed to retain out of the proceeds a balance due on the general account between him and the drawers. The payee of the bill then brought the present action, claiming the right to be paid the amount of the bill out of the proceeds of the consignments, in priority to all other persons, on the ground that the bills of exchange amounted to a specific appropriation of the goods to meet the bill. But the Court of Appeal agreed with Chitty, J., that the bill had not that effect. Fry, L.J., quotes with approval the remark of Mellish, L.J., in *Rober v. Ollier*, L. R. 7 Chy. 699, where he says:—

"The indorsement of a bill gives only a right to the bill, and I do not think any mercantile man would suppose, because he saw in the bill the words 'which place to account of cargo A,' that he was to have a lien on that cargo. A mercantile man who is intended to have a lien on a cargo expects to have the bill of lading annexed; if there is no bill of lading annexed, he only expects to get the security of the bill itself."

STATUTE OF LIMITATIONS—PAYMENT OF INTEREST—ENTRY AGAINST INTEREST.

Whatever may be thought of the morality of Statutes of Limitations, there can be no doubt they are sometimes made use of to defeat honest claims. *Newbould v. Smith*, 29 Chy. D. 883, is an instance of this. The action was brought in 1884 on two mortgages for foreclosure. The mortgagor set up the Statute of Limitations. As to one of the mortgages, which was by deposit, there was no evidence of payment of interest since 1866, except an entry in the books of the deceased mortgagee of £50, as paid in 1878 by the mortgagor as rent and interest, the mortgagor at that time having parted with his equity of redemption. As to the other mortgage, it was established that the solicitor for the mortgagor had paid interest to the mortgagee, and that it had been taken into account between the mortgagor and his solicitor up to 1866; and that from that time the solicitor continued to pay the interest, but no proof could be adduced that he acted as agent for the mortgagor, or that the latter had furnished the money. Upon this state of facts it was held by North, J., that the entry in the deceased mortgagee's books, though, as an acknowledgment of money received, it was against

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the interest of the person who made the entry, yet as it would prove the revival of a debt then barred, it was for his interest, and therefore could not be received on behalf of his representatives; and that, even if receivable in evidence, it would not support the plaintiff's case; and as to the payment of interest on the second mortgage, in the absence of proof that the mortgagor authorized or adopted the payments made by the solicitor, they were insufficient to take the case out of the Statute of Limitations. The learned judge concludes his judgment thus:—"Although I think it clear that the mortgage debt has never been paid, yet having regard to the time that has elapsed since any payment or acknowledgment was made, the plaintiff's claim fails and the action must be dismissed with costs." It is certainly somewhat alarming to find that interest may be regularly paid on a mortgage, and notwithstanding that the mortgagee may be barred of recovering the principal, unless he has taken care to preserve evidence that the person paying the interest was duly authorized to do so by the mortgagor.

TRUSTEES—INVESTMENTS—UNCONTROLLED DISCRETION.

The only case remaining to be noticed in the Chancery Division is *In re Brown, Brown v. Brown*, 29 Chy. D. 889, in which certain trustees (who were also executors) having an uncontrolled power of investment of moneys of an estate, before the commencement of an action to administer the estate, had in exercise of this power invested moneys of the estate in the purchase of bonds of a foreign government, bonds of a colonial railway company, and shares of a bank on which there was a further liability. The chief clerk, in taking the accounts of the testator's estate, disallowed the trustees the moneys applied in the purchase of the bonds and shares. But Pearson, J., although holding that the investments in question ought not to be retained, nevertheless, as the trustees had acted *bona fide* and no loss had resulted to the trust estate, allowed the sums which had been laid out in making the investments.

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LAND LAW REFORM.

The letter of Mr. Davey, Q.C., on the subject of the reform of the land law is of great interest and importance. Not only is it the letter of an able lawyer and conveyancer, but of a man who in the natural course of events may be expected to have the opportunity of carrying his ideas into effect. Mr. Davey appears to look forward in the future to a system of registration of titles, and he justly points out that the difficulty of obtaining a land register lies in the transition from the present complicated system of settlements to the simplicity of registered indefeasible titles. It is not clear whether Mr. Davey means the proposals which he makes to take the place of a land register, for which we must wait until matters have simplified themselves, or whether he considers that a land register could now be introduced. A general requirement of compulsory registration would do much injustice, because much land in the country is held on titles which would not bear investigation, although the holders have a good possessory title. On the other hand, too much stress must not be laid on the advantages of what is called the free transfer of land. The worst use to which you can put land is constantly to change its owners. The use of land is in cultivating it, and not in buying and selling it. It is true that the cost of transferring land is excessive when compared with the cost of transferring other property. This is generally attributed to the wickedness of lawyers; but its cause is, first, the complication of the law of real property, which requires time and care to apply to particular titles; and, secondly, the stamp, the cost of which is popularly supposed to go into the yawning pocket of the lawyer, but which, in fact, goes to the Exchequer. Mr. Davey's proposals are not complete, as he looks forward to an ideal as to the present practicability of which he does not give his opinion, but the suggestions which he makes of immediate changes of the law deserve, so far as they go, to be considered one by one. The first suggestion is to abolish primo-

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geniture in case of intestacy. Probably there will be little opposition to this proposal; although many will not agree with Mr. Davey's reason for supporting it. He says that "where the State makes a will for a man it should do that which a prudent person actuated by moral considerations would do." Is it not rather that the State should make such a will as it considers most for the advantage of the State that a man should make? The *rationale* of primogeniture was the keeping of landed property together. Opinions now differ as to the soundness of this policy, and if there is any general feeling that real property ought to be distributed instead of being kept together, there is no strong reason why it should not. The proposal, however, would re-open the Statute of Distributions. According to that statute, if the wife die intestate everything goes to the husband, and there are other provisions which would become more important when applied to realty. Mr. Davey, as appears from the bill which was brought in by him, and to which he refers in his letter, would not apply them bodily, but a revision of the statute in its application to real property would give rise to a very heated controversy, which it would be most undesirable to arouse. Everyone would consider himself competent to take part in the fascinating occupation of giving away other people's property, and no two persons would agree how it should be done. The difficulty about abolishing primogeniture is not that people care very much about it—to the majority of us it is a matter of indifference; but we are accustomed to it, and it would be difficult to find a general agreement upon a substitute. Upon the principles of the change there could be no valid reason why any distinction should be drawn between real and personal property; and yet most Englishmen would shrink from applying the Statute of Distributions, which was drawn on the assumption that real property would go to the heir, bodily to the inheritance of land. The extension of the Thellusson Act, so as to prohibit accumulations altogether, will probably not meet with much objection. It has no special connection with the question in hand, as the Act applies equally to realty and personalty, and it cannot be supposed that Mr. Davey when he refers to "rents and

profits" does not include the income of personal estate. Mr. Davey's next suggestion is to repeal the statute *De donis*, and thereby abolish the estate tail. We suppose he would do something more than abolish the statute; because, by merely so doing, he would revive the operation of a grant to the heirs of the body as a conditional grant, the condition of which was satisfied, so that the land might be sold, on the birth of heirs of the body. What Mr. Davey means is to turn estates tail into estates in fee-simple subject to a gift over on death under the age of twenty-one. This raises the question whether it is expedient to destroy estates tail; and the same question is raised in regard to Mr. Davey's last proposition—namely, to abolish the power of creating life interests. Mr. Davey would enable a testator to give a life estate to his widow only. This concession would seem to let in others. If a testator for his widow, why not a testatrix for her widower, and why not an intending wife for her children? If life estates are abolished in the case of realty, they must also be abolished in the case of personalty. It would be absurd, to insist, for example, that the terms of an ordinary marriage settlement should not be affixed to land but may be to personalty. The effect would be to depreciate the value of land in a way not intended by the promoters. The question, therefore, raised by Mr. Davey is whether property ought to be allowed to be tied up for a life; and the answer which he gives is that it ought not. We are able to see that in the case of land the abolition of life interests would simplify titles and be a long step towards an effective system of registration, but to make such a change with such an object would be to sacrifice substance to form. The expeditious buying and selling of land is not such an object that people should be forbidden from prudently making provision for the future. In order to substantiate his case, Mr. Davey ought to show that it is for the general benefit of society that property of all kinds should change hands as quickly as possible, and that its accumulation either in the hands of individuals or families should everywhere be discouraged. This may be true; but we doubt whether at present it obtains general assent.

It will be seen that Mr. Davey, in dis-

curring land law reform, is necessarily led into the discussion of the laws of property. The only points discussed in his letter, in which the law is different as to land and as to other things, are primogeniture, administration, and estates tail. As to the first of these, there is practically a general agreement, or, at least, an indifference to change, so far as the principle is concerned; but there are difficulties in carrying it out. The proposal that the executor and the administrator shall be the real as well as the personal representative of a deceased person has often been made, and nearly as often approved. There is no reason why this change should not be made apart from the others, and any lingering difference there may be between the liability of the realty and personalty of a deceased person for his debts abolished once for all. The change would be convenient, and a great saving of expense and friction. With regard to the abolition of estates tail, Mr. Davey would probably not think the change worth while unless life estates in land were abolished too; and life estates in land, as we have seen, involve life estates in personalty. The estate tail is used by persons desirous of founding or maintaining a family, and is the basis of the property of the peers and squires of the country. The drawbacks which it possesses in the way of defrauding creditors and keeping land out of the market are now very slight. Possibly it may be capable of further amendment in these respects; but care should be taken that it should not be abolished simply because it may be obnoxious to the envy of certain rather clamorous persons. Mr. Davey's statement in regard to tenants for life, that their interest is "to take as much out of the land and put as little into it as possible, reckless of bad cultivation, deterioration, and impoverishment," is not confined to tenants for life in the technical sense. After all, no one can be practically more than a tenant for life, and the less land is allowed to be settled the less will be the interest taken in it and the inducement to treat it well.—*Law Journal*.

NOTES OF CANADIAN CASES.

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LAW SOCIETY.

SUPREME COURT.

From Exchequer Court.]

WINDSOR AND ANNAPOLIS RAILWAY COMPANY (*Appellants*), AND THE QUEEN AND THE WESTERN COUNTIES RAILWAY COMPANY (*Respondents*).

Petition of right—Agreement with Government of Canada for continuous possession of railroad—Construction of—Breach of, by Crown in assertion of supposed rights—Damages—Joint misfeasor—Judgment obtained against—Effect of, in reduction of damages—Pleading—37 Vict. ch. 16.

By an agreement entered into between the Windsor and Annapolis Railway Company and the Government, approved and ratified by the Governor-in-Council, 22nd September, 1871, the Windsor Branch Railway, N. S., together with certain running powers over the trunk line of the Intercolonial, were leased to the suppliants for the period of twenty-one years from 1st January, 1872. The suppliants under said agreement went into possession of said Windsor Branch and operated the same thereunder up to the 1st August, 1877, on which date C. J. B., being and acting as Superintendent of Railways, as authorized by the Government (who claimed to have authority under an Act of the Parliament of Canada, 37 Vict., ch. 16, passed with reference to the Windsor Branch, to transfer the same to the Western Counties Railway Company otherwise than subject to the rights of the Windsor and Annapolis Railway Company), ejected suppliants from and prevented them from using said Windsor Branch and from passing over the said trunk line; and four or five weeks afterwards said Government gave over the possession of said Windsor Branch to the Western Counties Railway Company, who took and retained possession thereof. In a

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suit brought by the Windsor and Annapolis Railway Company against the Western Counties Railway Company for recovery of possession, etc., the Privy Council held that 37 Vict. ch. 16, did not extinguish the right and interest which the Windsor and Annapolis Railway Company had in the Windsor Branch under the agreement of 22nd September, 1872.

On a petition of right being filed by suppliants, claiming indemnity for the damage sustained by the breach and failure on the part of the Crown to perform the said agreement of the 22nd September, 1872, the Exchequer Court of Canada (GWYNNE, J., presiding) held that the taking the possession of the road by an officer of the Crown under the assumed authority of an Act of Parliament was a tortious act for which a petition of right did not lie.

Held, on appeal to the Supreme Court of Canada (STRONG and GWYNNE, JJ., dissenting)—The Crown by the answer of the Attorney-General did not set up any tortious act for which the Crown claimed not to be liable; but alleged that it had a right to put an end to the contract, and did so, and that the action of the Crown and its officers being lawful and not tortious they were justified. But, as the agreement was a continuous, valid and binding agreement to which they had no right to put an end, this defence failed. Therefore the Crown, by its officers, having acted on a misconception of or misinformation as to the rights of the Crown, and wrongfully, because contrary to the express and implied stipulations of their agreement, but not tortiously in law, evicted the suppliants, and so, though unconscious of the wrong by such breach, became possessed of the suppliants' property. The petition of right would be for the restitution of such property and for damages.

Prior to the filing of the petition of right, the suppliants sued the Western Counties Railway Company for the recovery of the possession of the Windsor Branch, and also by way of damages for moneys received by the Western Counties Railway Company for the freight or passengers on said railway since the same came into their possession, and obtained judgment for the same, but were not paid. The judgment in question was not pleaded by

the Crown, but was proved on the hearing by the record in the Supreme Court of Canada to which an appeal on said cause had been taken and which affirmed the judgment of the Supreme Court of Nova Scotia.

Held, *Per* RITCHIE, C.J., and TASCHEREAU, J.—That the suppliants could not recover against the Crown, as damages, for breach of contract, what they claimed, and had judgment for, as damages for a tort committed by the Western Counties Railway Company, and in this case there was no necessity to plead the judgment.

Per FOURNIER and HENRY, JJ., that the suppliants were entitled to damages for the time they were by the action of the Government deprived of the possession and use of the road to the date of the filing of their petition of right.

Henry, Q.C., and *McCarthy*, Q.C., for appellants.

Lash, Q.C., for respondents.

From Quebec.]

PICHE V. THE CITY OF QUEBEC.

29 & 30 Vict. cap. 57, secs. 20 and 21 — By-law in pursuance thereof—Validity of—Commercial traveller—Arrest of, for selling without license—Action for illegal arrest—Evidence—Amendment of pleadings by Supreme Court of Canada.

By 29 & 30 Vict. cap. 57, secs. 20 and 21 the City Council of Quebec was authorized to make any by-law to compel any transient merchant or trader, his agents, clerks or employés, or any person selling in the city by samples, to take out a license, and for a violation of the by-law to arrest any such person. On the 12th October, 1866, a by-law was passed, fixing the license fee at sixty dollars, and giving power to the recorder to impose a fine, not exceeding two hundred dollars, to any person convicted of contravening the by-law. One P., a commercial traveller for a firm in Montreal, was taking orders in Quebec for his firm, and had a small screw in his hand as a sample, when he was arrested by a policeman, and brought to the station. He subsequently paid the license, and brought an action against the corporation, complaining of the false and illegal

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arrest and imprisonment. The corporation by their plea justified the arrest upon the ground that P. had openly committed a breach of the by-laws and municipal regulations in force, by selling by sample, and without having first obtained a licence.

Held (affirming the judgment of the Court below), HENRY, J., dissenting, that there was sufficient evidence of a breach of the by-law to justify the arrest.

Per STRONG and FOURNIER, JJ.—That the Court would permit an amendment of the pleadings, which would adapt the allegations of the parties to the case as disclosed by the evidence viz.: That P. was following the occupation of a transient merchant or trader, without a license in the city of Quebec, at the time of his arrest.—(HENRY, J., dissenting.)

Appeal dismissed with costs.

MacLaren, for appellant.

Pelletier, Q.C., for respondents.

ATTORNEY-GENERAL OF CANADA V. BANK OF MONTREAL.

Municipal taxation—Property leased to and occupied by the Crown exempt from.

Held (reversing the judgment of the Court below), that property situated in the city of Montreal, being under lease to the Crown, and occupied by officers and servants of the Crown for public and military purposes, is exempt from municipal taxation by the corporation of Montreal.

Appeal allowed with costs.

Church, Q.C., for appellant.

Roy, Q.C., for respondent.

SWEENEY V. BANK OF MONTREAL.

Stock held in trust—Purchase of by a bank—Effect of—Mandatory and pledgee, obligations of a—Action to account—Arts. 1755, 2268, C.C. (P.Q.)

S. brought an action against the Bank of Montreal, to recover the value of stock in the Montreal Rolling Mills Company, transferred to the bank, under the following circumstances. S.'s money was originally sent out from England, to J. R., at Montreal, to be invested in Canada for her. J. R. subscribed for a certain amount of stock in the Montreal Rolling Mills

Company, as follows: "J. Rose in trust" without naming for whom, and paid for it with S.'s money. He sent over the certificates of stock to S., and subsequently paid her the dividends he received on the stock. Becoming indebted to the Bank of Montreal, R. transferred to the manager of the bank as security for his indebtedness, some 350 shares of the Montreal Rolling Mills Company, and the transfer showed on its face that he held these shares "in trust." The Bank of Montreal then received the dividends credited to them to J. R., who paid them to S. J. R. subsequently became insolvent, and S. not receiving her dividends, sued the bank for an account.

Held (reversing the judgment of the Court below), STRONG, J., dissenting, that there was sufficient to shew that J. R. was acting as agent or mandatory of S., and the Bank of Montreal not having shewn that J. R. had authority to sell or pledge the said stock, S. was entitled to get an account from the bank, Arts. 1498 and 2268, C.C.

Appeal allowed with costs.

Kerr, Q.C., for appellant.

Lastlamme, Q.C., and *Robertson*, Q.C., for respondents.

STANTON V. CANADA ATLANTIC RAILWAY COMPANY.

Judgment by Court of Appeal quashing interim injunction—Not appealable.

In this case on the 1st of September, 1883, Mr. Justice Torrance, of the Supreme Court for Lower Canada, ordered the issue of a writ of injunction, returnable on the 30th day of October then next, enjoining the respondents and certain other persons named from issuing or dealing with certain bonds, until otherwise ordered by the said judge of Court thereof.

About the 13th of November, 1883, the Canada Atlantic Railway Company presented a motion to quash the injunction. On the 13th December following, Mr. Justice Mathieu, of the Supreme Court, declared that the said writ of injunction had been issued without reason *sans cause*, and suspended it until the final adjudication of the action on the merits.

Both the appellants and respondents appealed from this judgment to the Court of Queen's Bench (appeal side), which Court on

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the 21st of January last rendered judgment quashing the injunction absolutely.

On the 9th of February following, the appellants gave notice of their intention to appeal to the Supreme Court of Canada, and on the 19th of February presented a petition to Mr. Justice Monk, one of the judges of the Court of Queen's Bench, for the allowance of the appeal. On the 20th of February, Mr. Justice Monk rendered judgment, refusing to allow the appeal on the ground that the judgment quashing the writ of injunction was not a final judgment, and "notwithstanding the offer and sufficiency of the security."

On the 27th of February last, the appellants by their attorneys, served notice of their intention to move before a judge of this Court, to be allowed to give proper security to the satisfaction of this Court, or of a judge thereof, for the prosecution of their appeal to this Court, notwithstanding the refusal of the Court below to accept said security, and notwithstanding the lapse of thirty days from the rendering of the judgment from which they desired to appeal, and further to obtain an extension of time for settling the case in appeal.

This motion came before Mr. Justice Henry, in Chambers, on the 5th March, who enlarged it into Court, and it was on the same day argued at length before the Court.

Held, that the judgment of the Court of Queen's Bench (appeal side), quashing the interim injunction was not appealable.

Motion refused.

Church, Q.C., and Ferguson, for appellants.

Durham, Q.C., and Gormully, for respondents.

From New Brunswick.]

MACDONNELL ET AL. V. McMASTER ET AL.

Deed executed, sealed and registered—Effect of—Rev. Stat., N. B. (4th series) ch. 96, sec. 33—Copy of deed—Admissibility of in evidence.

In an action of ejectment brought against respondents the appellants claimed title from H. McM. who conveyed to his son, R. McD., by deed dated June 18th, 1856. On 19th of April, 1869, R. McM. and U. X. mortgaged their interest in the land to appellants, and this mortgage was foreclosed and lands sold and purchased by P. S., who received a sheriff's

title. H. McM., defendant in possession, by his plea claimed that he was tenant in common of the premises.

The deed was signed and sealed by H. McM. before two subscribing witnesses and was subsequently registered by one of these witnesses, another son of H. McM.

At the trial, in the absence of the original deed, a copy of the deed, certified by the registrar of deeds, was put in without objection as to the insufficiency of the affidavit required by the statute. There was no evidence of an actual delivery of the original deed by H. McM. to R. McM.

Held, that when the deed was executed and placed on record H. McM. parted with all control over the deed and vested the land in grantee, and respondent was estopped from denying the due execution of the deed to R. McM.

2. That the deed being admitted to have been registered, and a copy of the same admitted at the trial without objection, it was too late now to object to the admissibility of the copy.

Tupper, for respondents.

Chrysler, for appellants.

QUEEN'S BENCH DIVISION.

IN RE CLARK AND THE TOWNSHIP OF HOWARD.

Drainage by-law—46 Vict. ch. 18, sec. 588 (O.)—Validity of by-law—Costs.

A by-law which varies from the provisions of a statute in matters affecting the rights of property and of taxation is invalid. A by-law therefore defining the duties of inspectors of drains, enacting (1) That obstructions wilfully placed in drains should be removed by the parties placing them there, or at their expense, without regard to whether such parties owned the lands through or between which such drains were situate; (2) That if such obstructions were removed by the council the cost should, on completion of the work, be paid by the council—instead of enacting that it should be so paid only in the event of the party chargeable with the obstruction failing to do so; (3) That if paid by the council the amount

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of such cost should be charged on the collector's roll against the lands of the party chargeable—instead of only against the party himself; (4) Because no appeal was provided for against such charging of such cost upon the collector's roll, was quashed with costs.

Aylesworth, for motion.

Pegley, contra.

REGINA V. RICHARDSON.

Criminal law—Conviction—Award of further imprisonment.

A conviction in this case for keeping a house of ill-fame held bad for awarding, after adjudication of a penalty by fine and imprisonment, further imprisonment in default of sufficient distress or of non-payment of the fine.

Held, also, this not a mere formal defect within sec. 30 of 32-33 Vict. ch. 32 (D.).

Held, also, that the effect of sec. 28 was not to take away the writ of *certiorari*.

Osler, Q.C., for motion.

J. G. Scott, Q.C., contra.

Wilson, C.J.,]

BANK OF HAMILTON V. HARVEY.

Non-negotiable promissory note—Right to recover—Pleading.

The statement of claim was that the defendant, being a director of a company, jointly with three, others made a promissory note payable to said company, with the intent that it should be used by the company upon the credit of the makers for the purposes of the company, and the company indemnified the maker against liability thereon; that the plaintiffs discounted the note for the company, and with the knowledge and consent of the defendant, paid the proceeds to the company, and the money was applied to the purpose of the company, and that after default in payment the defendant gave security to the plaintiffs against his liability upon the note.

Held, on demurrer, that the statement of claim was good, and that the plaintiffs were entitled to recover against the defendant upon the note, the non-negotiable instrument.

Muir, for demurrer.

E. Martin, Q.C., contra.

O'Connor, J.,]

REGINA V. NEWTON.

Conviction for keeping house of ill-fame—32-33 Vict. ch. 32—Forfeiture of fine—Further imprisonment.

Defendant was convicted under proceedings taken under 32-33 Vict. ch. 32, not 32-33 Vict. ch. 28, for keeping a house of ill-fame, but the conviction did not "adjudge" any imprisonment or any forfeiture of fine imposed.

Held, bad.

The conviction and warrant of commitment ordered defendant to be imprisoned for six months, and to pay within said period to said magistrate the sum of \$100. without costs, to be applied according to law, and in default of payment before termination of said period, further imprisonment for six months.

Held, bad for uncertainty, in requiring the fine to be paid to the magistrate personally instead of the gaoler.

Aylesworth, for motion.

Capreol, contra,

CHANCERY DIVISION.

Ferguson, J.]

[September 21.

MURRAY V. MALLOY.

Will—Devise—Statute of mortmain—Bequest of personalty to charitable institution to build a college.

J. M. died on August 9th, 1884, having made his will five days before, in which, after giving certain legacies, he provided as follows:—"I give and devise all my real and personal estate whatsoever and wheresoever, with the above exceptions, to the Lutheran Church, for the purpose of building a college in Canada and not elsewhere, and in his name." The Lutheran Church was not incorporated.

Held, that the devise of the realty and all personalty savouring of the realty was bad.

Held also, following *Giblett v. Fobson*, 3 M. & K. 517, that the bequest of the pure personalty was also bad; that a bequest of money or other personalty to any charitable institution to build or erect buildings taken by itself is within the Statute of Mortmain, and that the onus of showing that the intention of a testa-

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tor was restrained within lawful limits is upon the party seeking to take the bequest out of the statute; and that the intention must appear absolutely certain and clear; and that land already in mortmain must be pointed out as the site for the building, or the words of the will must expressly exclude the application of the money given in the acquisition of land, which was not done in this case.

W. N. Miller, for the plaintiffs.

D. Black, for the Lutheran Church.

Middleton, for the executors.

MILLER V. CONFEDERATION LIFE INS. CO.

Cross-actions—Staying proceedings—Burden of proof.

On the 4th of February, 1885, the present defendants commenced an action in the Chancery Division against these plaintiffs to set aside a policy of insurance.

On the 13th of May, 1885, this action was begun to recover the amount of the policy, and on the 23rd of May the plaintiffs moved to stay proceedings in the former action.

Held, following the rule laid down in *Thomson v. S. E. R. Co.*, L. R. 9 Q. B. D. 320, that there is no hard and fast rule in cases of cross-actions that the one commenced last should be stayed. The Court should take the circumstances into consideration and exercise its discretion as to what is the fairest mode of settling the dispute, and give the conduct of the litigation to the party upon whom the substantial burden of proof rests,

Subsequently, on the 27th of June, 1885, the defendant in the first action moved for a stay of proceedings in it, and the Master made an order accordingly.

On appeal on October 12, *BOYD, C.*, declined to interfere at present, as the action of *Miller v. Confederation Life* had been tried, a verdict given for the plaintiff. Otherwise, he stated, he would have followed *National Insurance Co. v. Egan*, 20 Gr. 469. He reserved leave to renew the motion if the verdict should be set aside and varied the order of the Master by consolidating the two actions.

Hoskin, Q.C., for *Miller*.

Cassels, for the Company.

PRACTICE.

Ferguson, J.]

[June 30.]

RE RYAN.

Toronto agents—Lien on fund in Court.

The Toronto agents of a deceased solicitor were held entitled to a lien on a sum of money in Court to the credit of this matter to which the solicitor was entitled for his costs to the extent of their unpaid agency bill of charges in this matter; and it was ordered that their bill should be paid out of the fund in priority to the claims of the other creditors of the solicitor.

Holman, for Thomas Johnston, a creditor.

W. A. Foster, for the Toronto agents.

Ferguson, J.]

[October 1.]

JAMIESON V. PRINCE ALBERT COLONIZATION CO.

Appeal—Rescinding order—Time—Rule 427, O. J. A.

An *ex parte* order for the production of documents was made by the Local Master at Belleville on the 17th August, 1885, and an order was made by the same officer on the 9th September, 1885, refusing to rescind his former order. The defendants appealed from the latter order.

Held, that the appeal was in effect an appeal from the original order, as the result, if the appeal was successful, would be to rescind that order, and the appeal was therefore dismissed as too late under Rule 427, O. J. A.

Arnoldi, for the appeal.

Hoyles, contra.

Mr. Dalton, Q.C.]

[October 1.]

BOUGHTON V. THE CITIZENS' INSURANCE CO. ET AL.

Production of documents—Privilege—Letters containing references to solicitors' advice.

Letters, written to the defendant company at Montreal by a clerk who was sent to Toronto to investigate the plaintiff's accounts, and who, on his reporting, was instructed to

MANITOBA REPORTS—CORRESPONDENCE.

take the advice of the company's solicitors, and, if they approved, to have the plaintiff arrested, which letters were shown to have been written in anticipation of litigation, after consultation with the solicitors, and to contain references to their advice, were held privileged from production.

Semble, a party cannot make a second application for a better affidavit on production when he did not on the first application object to the non-production of the documents he seeks to have produced on the second.

George Macdonald, for the plaintiff.

Rae, for the defendants.

MANITOBA REPORTS.

NOTES OF RECENT CASES.

North-West Territories—Grand jury—Coroner's Inquest.

Appeal from N.-W. Territories. In the Territories it is not necessary that a trial for murder should be based upon an indictment by a Grand Jury or a coroner's inquest.—*Queen v. Connor*.

Mechanics' Lien Act—Assignment by contractor—Priority.

Held, 1. A sub-contractor is entitled to assert a mechanic's lien, even although the contract between the owner and original contractor provides that no workman should be entitled to any lien.

2. An assignee of the contract price for the erection of a building is not entitled to the money as against the lien of a sub-contractor, unless the owner has in good faith bound himself to pay the assignee.—*Anly v. Holy Trinity Church*.

Corporation—Libel—Malice.

The manager of one branch of the defendant company wrote certain letters to another branch, which might have constituted a libel on the plaintiff. There was no evidence that the corporation, or the directors, or the managing board authorized, or had any knowledge of the letters being written.

Held, that the defendants were not liable.

Quare, can a corporation be guilty of malice.—*Freiborn v. Singer Sewing Machine Co.*

Promissory note—Alteration—Recovery upon note in original condition—Variance in corporate name.

A company being indebted to the plaintiffs, the company's manager agreed to procure and deliver to the plaintiffs a note signed by some of the officers of the company. He delivered the note sued upon. It was proved that after the note had been signed, but before its delivery, the manager altered the note by inserting the words "jointly and severally." The plaintiffs were ignorant of this fact at the time.

Held, that the note might be sued upon in its original condition.

A note was made by filling up an engraved form. Between the words "after date" and "promise to pay" the space left for the words "I" or "we" was very small, and the words "jointly and severally" could not have been written in the space.

Held, that in such a case the mere fact that the words "jointly and severally" are plainly interlined by being written over the place where they are intended to be read, but in the same handwriting as the rest of the note, is not sufficient notice of an alteration.

A note was made payable to The Waterous Engine Works, but was declared upon as payable to the Waterous Engine Works Company, Limited.

Held, no variance.

The word "Limited" is no part of the name of a company incorporated under the Dominion Joint Stock Company's Act.—*Waterous Engine Works Company, Limited, v. McLean*.

CORRESPONDENCE.

LEGISLATION AND SAWDUST.

To the Editor of the LAW JOURNAL :

SIR,—It is a matter of surprise to me that among the many valuable comments which have appeared in your pages and elsewhere touching the legislation of the last session of our dear little Legislature, nothing has been said, so far as I am aware, about chapter 24, entitled an Act respecting Saw-mills on the Ottawa River. Don't you believe it, Sir. It is not an Act respecting Saw-mills. It is an Act respecting the Law of Injunctions. The sawdust in the Act is intended simply to be thrown in your eyes, and my eyes, and the eyes of the public, and prevent us seeing what an outrage this little Act is on some of the most venerable principles of the British law-giver. Henceforth, the law of Injunc

CORRESPONDENCE—ARTICLES OF INTEREST.

tions will be divisible into two parts: the law of Injunctions affecting Saw-mills on the Ottawa River, and the law of Injunctions not affecting Saw-mills on the Ottawa River. The intelligent student, who, guided by some knowledge of law and much intuition of natural justice, when asked to give the rule in Shelley's case, replied that it was the same as the rule in anybody else's case, for that the law was no respecter of persons, would be wrong now, hopelessly wrong. The law—our law—does respect persons; it respects persons who own Saw-mills on the Ottawa River.

Section 1 of this insidious little Act provides that when any person who, but for this Act would be entitled to the same, claims an injunction against the owner of any Saw-mill on the Ottawa River for any injury or damage, or for any interference with his rights by reason of the throwing of any sawdust or other mill refuse into the said river, "the Court or judge may refuse to grant an injunction in case it is proved to the satisfaction of such Court or judge by the person against whom such injunction is claimed that having regard to all the circumstances, it is on the whole, proper and expedient not to grant the same." Let us stop here for a moment. Stop and admire! I was not aware that courts and judges were in the habit of granting injunctions where it was proved to their satisfaction to be under all the circumstances proper and expedient not to grant the same. "All the circumstances," therefore, either means nothing, or it means a great deal more than I, for one, think it ought to mean.

Let us continue our study of the section, and we shall see what it does mean: "and for that purpose shall take into consideration the importance of the lumber trade to the locality wherein such injury, damage or interference takes place, and the benefit and advantage, direct and consequential, which such trade confers on the locality and on the inhabitants thereof, and shall weigh the same against the private injury, damage or interference complained of."

In other words, Sir, this Act over-rides ruthlessly one of the grandest and most fundamental principles of British law, viz., that private rights prevail over public convenience; but what is perhaps worse, it over-rides that principle not in favour of everybody, but only of owners of Saw-mills on the Ottawa River. But let us read on. Section 2 provides that this law—save the mark!—shall "apply to pending suits as well as to suits which may be hereafter brought." Where is our public morality? Is civilization a failure? And is the Caucasian played out?

Surely this Act must have brought a blush upon the face of every honest man—nay, of every lawyer—in the House, as it did on that of

Your obedient servant,

MUTARE SPERNO.

ARTICLES OF INTEREST IN CONTEMPORARY JOURNALS.

Solicitor and artiled clerks.—*Law Journal*, England, May 30.

Mandamus and rule to justices.—*Ib.*

Set-off and solicitors' lien.—*Ib.*, July 11th.

Inferior courts and prohibition.—*Ib.*, July 18th.

Common words and phrases—

Decrepit—Movable property—Merchant—Necessaries for support and maintenance of family—Telegraph—Telephone—Shop.—*Albany Law Journal*, May 30th.

Summer—Manufacturer—Carriage—Corn—Tools.—*Ib.*, July 18th.

Branch railway—Traveller—Business or vocation—Harvest—Domestic use.—*Ib.*, July 27.

Delivery not always essential to a gift.—*Ib.*, June 6th.

Malicious prosecution of civil suit.—*Ib.*, August 15th, 22nd.

Married women traders.—*American Law Register*, June.

Contracts made on Sunday.—*Ib.*

Employés as fiduciaries of their employers.—*Ib.*, July.

Married woman with separate business employing husband as manager—Rights of creditors.—*Ib.*

Validity of *bona fide* voluntary conveyances by solvent debtors as against prior creditors.—*Ib.*, August.

The competency of witnesses as dependent upon their moral status.—*American Law Review*, May-June.

Contracts of married women.—*Ib.*

Police control of dangerous classes other than by criminal prosecutions.—*Ib.*, July-August.

Title to dividends: 1. As between shareholders and the corporation or its creditors. 2. As between successive absolute owners of shares.—*Ib.*

The competency of witnesses as dependent upon their mental status.—*Ib.*

Pardon and amnesty.—*Criminal Law Magazine*, July.

The English law reports.—*Law Quarterly Review*, July.

Mistake of law as a ground of equitable relief.—*Ib.*

The position and prospects of the legal profession.—*Ib.*

The seizure of chattels.—*Ib.*

Justice in Egypt.—*Ib.*

Membership in stock exchanges or boards of trade etc. Can such membership be transferred to judicial or legal process.—*Central Law Journal*, June 5th.

Real estate broker's rights to compensation.—*Ib.*, June 12th.

The rights of gratuitous passengers on railways.—*Ib.*, June 19th.

Guaranty and suretyship as applied to acts against makers and endorsers of promissory notes.—*Ib.*, July 3rd.

FLOTSAM AND JETSAM.

Limitations in insurance policies as to time of bringing suit.—*Ib.*, July 10th.

Excluding pupils from public schools.—*Ib.*

Proceedings *in rem* as affected by death of party.—*Ib.*, July 24th.

Libel—Newspaper privilege.—*Ib.*, July 31st.

Liability of municipal corporations for damages in grading highways.—*Ib.*, August 14th.

The law of auxiliary administration.—*Ib.*, September 4th.

Solicitors having the control of trust funds.—*Irish Law Times*, June 13th.

Fresh injury arising from original tort.—*Ib.*, July 18th.

The law of judicial notice.—*American Law Register*, September.

Obligation of companies, such as telephone companies, to give equal facilities with all, and agreements in derogation thereof, etc.—*Ib.*

School law—Authority of teacher—Refusal of scholar to obey illegal regulation.—*Ib.*

Proving an alibi.—*Crim. Law Mag.*, Sept.

Larceny—Possession of recently stolen property—A presumption of fact.—*Ib.*

Cy pres and lapsed legacies.—*Law Journal (Eng.)*, September 5.

Posthumous charity.—*Ib.*, September 19.

FLOTSAM AND JETSAM.

A WOMAN was brought before a police magistrate and asked her age. She replied, "Thirty-five." The magistrate—"I have heard you have given that same age in this Court for the last five years." The woman—"No doubt, your honor. I'm not one of those females to say one thing to-day and another to-morrow."

"WHAT is the charge against this man?" asked the police judge, as an old negro was arraigned at the bar. "Drunkness," replied a policeman. "Old man, you took more than one drink, didn't you?" "Took fifty, sah." "You were not drugged?" "No, sah." "Do you think that the officer had a right to arrest you?" "Yas, sah." "Are you a preacher?" "No, sah." "Did you ever steal a shanghai rooster?" "Many a one, sah." "You don't claim to be honest?" "No, sah." "You have sold your vote, haven't you?" "Yas, an' fur a powerful little money." "Are you going to get drunk again?" "Yas, sah." "This is a very remarkable man," said the police judge. "Here, old fellow, is a \$10 bill. Such straightforwardness should be rewarded."—*Ex.*

ON behalf of James Bowen Barrett, solicitor, application was made before Mr. Justice Smith to release him from Holloway Gaol. A woman brought an action against a tramcar company for compensation for injuries, and Barrett was her solicitor. The jury could not agree, whereupon she brought another action, previously arranging with Barrett for half the damages, if she got a verdict, in addition to his costs. She obtained a verdict, with £250 damages. In accordance with the agreement, he retained half of these, besides taking his taxed costs. Thinking he had not suffered sufficient punishment, he applied for his release; but Mr. Justice Smith took a different view, and ordered him to be kept in prison till the 5th September. This is a caution to solicitors taking up cases on spec. It seems odd that it should so often be necessary to indicate that the law will not allow these bargains between solicitor and client. All a solicitor can claim is his bill of costs. *Pump Court.*

KING'S AND QUEEN'S COUNSEL IN ENGLAND.—In the year 1785 there appears to have been only 21 King's Counsel, 7 King's serjeants and 7 serjeants-at-law. In the Law List of 1805 there were 25 King's Counsel, 4 King's serjeants and 12 serjeants-at-law, and Wm. Alexander and Samuel Romilly, both King's Counsel, are described as equity draftsmen also.

In the year 1810 there were 31 King's Counsel, 5 King's serjeants and 14 serjeants-at-law. Of the King's Counsel, Sir S. Romilly, Garrow, Alexander, Fonblanque, and Anthony Hart are described as equity draftsmen; Sir Vicary Gibbs and Thomas Jarvis as special pleaders; Francis Hargrave and Hy. Martin as conveyancers.

In the year 1820 there were 33 King's Counsel, and of these Wm. Horne is described as an equity draftsman. There were 5 King's serjeants and 17 serjeants-at-law.

In the year 1830 there were 40 King's Counsel, 5 King's serjeants and 22 serjeants-at-law. Of the King's Counsel, Fonblanque is still described as an equity draftsman, as also is Tinney.

In the year 1840 there were 63 Queen's Counsel, 2 Queen's serjeants and 22 serjeants-at-law. C. T. Swanston, Q.C., is described as equity draftsman; and R. T. Kindersley, Q.C., as equity draftsman and conveyancer.

In the year 1850 there were 71 Queen's Counsel and 27 serjeants-at-law; in 1860, 114 Queen's Counsel, 1 Queen's serjeant and 30 serjeants-at-law; in 1870, 171 Queen's Counsel; in 1880, 173 Queen's Counsel. In the present year the number of Queen's Counsel is but little short of 200, and there are 11 serjeants-at-law.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

EASTER TERM, 1885.

During this term the following gentlemen were called to the Bar, namely:—

Messrs. Donald Malcolm McIntyre, with honours and gold medal; Robert Smith, John Macpherson, William Edward Middleton, John Tytler, Robert William Evans, Robert Victor Sinclair, Ernest Joseph Beaumont, James Redmond O'Reilly, George Eldon Kidd, James Chisholm, Robert Ormiston Kilgour, William Avery Bishop, Francis Gilbert Lilly, Donald Macdonald, William Beardsley Raymond, Christopher Conway Robinson, Charles Creighton Ross, John Thomas Sproule, Arthur Byron McBride. These names are arranged in the order in which the candidates appeared before Convocation for call.

The following candidates were admitted as students-at-law, namely:—

Graduates—Alexander Gray Farrell, William Henry Williams, Herbert Read Welton.

Matriculants—Samuel Storm Martin, James Henry Cooper.

Juniors—J. A. Fleming, W. G. Richards, R. M. Graham, J. P. Dunlop, W. G. Green, J. D. Lamont, C. Stiles, J. H. Denton, W. J. Whiteside, S. B. Arnold, W. Kennedy, J. R. Layton, W. L. Hatton, W. J. Williams, H. Armstrong, H. W. Ross, R. G. Pegley, A. H. Wallbridge, M. K. Cowan, J. J. Drew, M. Murdoch, G. H. Muntz, C. E. Lyons and F. C. Hastings.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885. { Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884. { Cicero, Cato Major.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb. I., II. and III.

ENGLISH.

A Paper on English Grammar.
Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography, Greece, Italy and Asia Minor. Modern Geography, North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,
Translation from English into French prose.
1884—Souvestre, Un Philosophe sous le toits.
1885—Emile de Bonnechose, Lazare Hoche.

LAW SOCIETY OF UPPER CANADA.

or NATURAL PHILOSOPHY.

Books—Arnot's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Benchor, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchler, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above.	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

FOR 1886, 1887, 1888, 1889 AND 1890

Students-at-law.

CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar. Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe. Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886

1888 } Souvestre, Un Philosophe sous le toits.

1890

1887 } Lamartine, Christophe Colomb.

1889

or, NATURAL PHILOSOPHY.

Books—Arnott's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutcheson.

Canada Law Journal.

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NOVEMBER 1, 1885.

No. 19.

DIARY FOR NOVEMBER.

1. Sun 22nd Sunday after Trinity. All Saints' Day.
2. Tues Draper, C.J., died, 1877.
3. Wed First Intermediate Examination.
4. Thur Sir John Colborne, Lieut.-Gov. U. C., 1838.
5. Fri Second Intermediate Examination.
6. Sat 23rd Sunday after Trinity.
7. Mon Prince of Wales born, 1841.
8. Tues Court of Appeal Sittings. Solicitors' Exam.
9. Wed Barristers' Examination.

TORONTO, NOVEMBER 1, 1885.

A NEW batch of Queen's Counsel for Ontario has been announced, though not yet gazetted. This has created no interest in professional circles, and has been received almost without comment. This may be rather hard on the very few of the appointees who are properly entitled to the distinction, but is the necessary consequence of the broadcast distribution of what was once an honour, but now appears to be the result of the "fortuitous concurrence" of some circumstances quite unconnected with professional position, seniority in the ranks, or otherwise.

THE case of *Turnbull v. Forman*, 15 Q. B. D. 234, noted *ante*, p. 329, has been followed, it will be observed, by O'Connor, J., in *Scott v. Wye*, also noted *ante*, p. 339. *Cameron v. Rutherford*, 10 P. R. 620, is therefore overruled, and the law must be taken to be settled, at all events for the present, that contracts made by a married woman prior to 25th March, 1884, only bind the separate property which she had at the date when the contract was made, and which she continues to have when judgment is recovered against her, according to the rule laid down in *Pike v. Fitzgibbon*.

THE law relating to married women's rights of property is full of surprises. We had confidently hoped and believed that the efforts of the Legislature had at last conferred upon married women as full control over their property as it was possible for the Legislature to give them. Our hopes and expectations are, however, apparently doomed to disappointment. It appears, according to the view of Pearson, J., in *Re Shakspear, Deakin v. Lakin*, 53 L. T. N. S. 145, that a married woman has now less power over property in which she has an absolute interest, contingent on her surviving her husband, than she has over property in possession, which is by statute declared to be her separate property. Under a marriage settlement executed in 1843 between Mr. and Mrs. Shakspear, a life policy was transferred by the husband to the trustees upon trust to receive and invest the money and pay the income to Mrs. Shakspear and her assigns during her natural life, in case she should survive her husband, and for her sole and separate use and benefit during her life in case she should marry again; and after her death in trust for the children of the marriage as tenants in common. Two children were born of the marriage, both of whom died intestate and unmarried. Mr. and Mrs. Shakspear on 7th Oct., 1884, executed an assignment of all their interest in the policy to Mr. Edward Deakin. The surviving trustee having refused to transfer the policy under this deed, the question was submitted to Pearson, J., whether Mrs. Shakspear was able to execute a valid assignment of her interest in the policy, and he held that she was not. He says: "At the present moment the life interest

MARRIED WOMEN AND THEIR PROPERTY—NOTICE OF ACTION.

of the wife is a contingent reversionary interest—she has no interest whatever in *presenti*. If she survives her husband she will be entitled in possession, but not for her separate use. She will be absolutely entitled as widow. The separate use only arises if she marries again. Under those circumstances I am asked to say that by virtue of the Married Women's Property Act an assignment by the wife passes her interest in the policy." After reading section 1 of the Act, he goes on to say: "It is said that the wife's interest in this case is 'separate property,' which she may thereafter acquire within the meaning of that section. I am of opinion that, according to the proper construction of that section, the contract must be entered into with respect to separate estate which the married woman has at the time of the contract. If she has entered into a contract and broken it, any separate property which she acquires afterwards is made liable for the breach of the contract which, under the Act, she was able to enter into by reason of her having separate estate. That is a very different thing from saying that her assignment passes a merely contingent reversionary interest to which she will become entitled if she survive her husband, and to which she may, if she marries again, be entitled for her separate use." So clear was the learned judge in this view that counsel who appeared for the trustees was not called on, and yet we cannot help thinking the learned judge has taken a very narrow view of the scope of the Act, and his conclusion has led to certainly an anomalous result. The learned judge seems to us to assume, without sufficient grounds, that the property which a married woman is entitled to dispose of under the statute must be property in possession. But anything that can be turned into money is surely rightly considered to be property, even though it be but a bare contingent reversionary right.

We cannot help thinking, therefore, that the learned judge has not only given an unnecessarily restricted meaning to the Act, but has added one more case to the list of those which have imposed an interpretation of the Act contrary to its real spirit and intention.

NOTICE OF ACTION.

THE successful maintenance of many actions depends on the plaintiff being able to prove that before action he has served the defendant with a notice of his intention to bring the action. One of the principal statutes requiring this notice to be served is the Act to protect Justices of the Peace and other officers from vexatious actions (R.S.O. c. 73). This Act applies to all actions brought against any justice of the peace, or any other officer, or person fulfilling any public duty, for anything done in the execution of his office. The Act extends not only to public officers over which the Provincial Legislature has jurisdiction, but also to all public officers and persons discharging public duties, whether such duties arise out of the common law, or are imposed by Act of either the Imperial or Dominion Parliament.

By the tenth section of this Act, a calendar month's notice in writing of the intended action has to be delivered to the person against whom the action is intended to be brought, or left for him at his usual place of abode, by the party intending to bring the action, or by his attorney or agent, in which notice the cause of action and the Court in which the same is intended to be brought must be clearly and explicitly stated, and upon the back thereof is to be endorsed the name and place of abode of the party intending to sue, and also the name and place of abode, or of business, of his attorney or agent, if the notice be served by an attorney or agent.

NOTICE OF ACTION.

There are, however, other statutes expressly requiring notice of action to be served in the particular cases therein referred to. For instance, the Division Court Act, R. S. O. c. 47, s. 231, which applies to actions brought for anything done in pursuance of that Act; the Special Constables Act, R. S. O. c. 83, s. 22; the Municipal Act, 46 Vict. c. 18, s. 340; the Customs Act, 46 Vict. c. 12, s. 226 (D.); the Militia Act, 46 Vict. c. 11, s. 89, ss. 2 (D.); the Crimes Act, 32 & 33 Vict. c. 29, s. 131 (D.); Land for Naval Defence Act, C. S. C. c. 37, s. 42; the General Inspection Act, 37 Vict. c. 45 (D.).

Where notice of action is required, it must strictly comply with the statute which requires it to be given. Where, however, there is a special act relating to the matter, it would seem that the notice of action, if it comply with the latter, will be sufficient, though it may not contain all that is required by the general act, R.S.O. c. 73, to which we have above referred. Thus in *Stephens v. Stapleton*, 40 U. C. Q. B. 353, and *McMartin v. Hurlburt*, 2 App.R. 146, it was held that a notice to a Division Court bailiff which complied with the provisions of the Division Court Act was sufficient, though it omitted some of the particulars required by R. S. O. c. 73, in other words, that the provisions of the two Acts were not cumulative.

When the action is intended to be brought in the High Court of Justice it is sufficient so to state, without going on to specify the particular Division, *Haines v. Johnston*, 3 O. R. 100. With regard to the cause of action, it has been repeatedly held that the notice must specify the time and place, when and where, the injury complained of was committed: *Friel v. Ferguson*, 15 C. P. 584; *Parkyn v. Staples*, 19 C. P. 240; *Sprung v. Ande*, 23 C. P. 152; *Moore v. Gidley*, 32 U. C. Q. B. 233. It is not, however, necessary that the exact time and place should be stated, reason-

able certainty is all that is required; thus where the notice stated the act complained of to have been committed "on or about the 28th of May last," and the place was described as "at or near the west half of lot 31, in the 2nd con. of Mulmur," and the wrong complained of was proved to have been committed on the 23rd and 28th days of May, and on lot 32, in the 2nd concession, the notice was held to be sufficient: *Langford v. Kirkpatrick*, 2 App. R. 513. The nature of the wrong complained of must be explicitly set forth. A letter which merely stated that damages had been sustained, for which the defendants would be held responsible, was held an insufficient notice: *Union Steamship Co. v. Melbourne Harbour Commissioners*, 50 L.T. N. S. 337.

In actions against public officers entitled to notice under R. S. O. c. 73, for anything done by them within their jurisdiction, the notice of action must state that the act complained of was done maliciously and without reasonable or probable cause: *Taylor v. Nesfield*, 3 El. & Bl. 725; *Howell v. Armour*, 7 O. R. 363. But when the act complained of was beyond or in excess of the defendant's jurisdiction, it is not necessary to allege want of probable cause, see R. S. O. c. 73, ss. 2, 20. With regard to the name and address of the plaintiff, and of his attorney, if any, reasonable certainty is also required. R. S. O. c. 73, requires the name and address to be endorsed on the notice, but when the name and place of residence of the attorney were not endorsed on the notice but added inside at the foot of it, it was held to be sufficient: *Bross v. Huber*, 15 U. C. Q. B. 625. But the subscription by the attorney at the foot of the notice, "A. B., attorney for the said C. D., Simcoe, Talbot District," was held insufficient, as not stating the place of residence of the attorney: *Bates v. Walsh*, 6 U. C. Q. B. 498. But a notice describing the plaintiff's abode as

NOTICE OF ACTION.

"of the township of Garafraxa, in the county of Wellington, labourer," was held to be sufficiently precise: *Neill v. McMillan*, 25 U. C. Q. B. 485, and see *McDonald v. Stuckey*, 31 U. C. Q. B. 577. Defects in the form of the notice cannot be amended after action brought: *McCrum v. Foley*, 6 P. R. 164; *Grant v. Beaudry*, 19 C. L. J. 51. Where the notice is given by a solicitor it is not necessary that he should serve it in person, his clerk may make the service: *Morgan v. Leach*, 10 M. & W. 558. The service should be effected as directed by the Act of Parliament requiring it to be given. Under R. S. O. c. 73, it may be made by delivery to the defendant personally, or it may be left for him at his usual place of abode. And even under the Division Court Act, which does not expressly state that the notice may be left at the defendant's place of abode, it has been held that leaving the notice with a defendant's wife for him at his residence is sufficient service: *Haines v. Johnston*, 3 O. R. 100. It is no objection that the statement of claim is delivered by a different solicitor from the one who gave the notice and issued the writ: *McKenzie v. Mewburn*, 6 O. S. 486.

Notwithstanding the generality of the words of R. S. O. c. 73, as to the persons entitled to notice, the judicial interpretation of the statute has established some important exceptions and limitations to the general rule, both as to the persons entitled to notice, and the circumstances under which they are so entitled. Of course the mere fact that a person holds a public office does not entitle him to notice of every action that may be brought against him. He is only entitled to notice when the action is brought to recover damages in consequence of something done in the execution, or assumed execution, of his office, or public duty.

The mere fact that a public officer has acted maliciously, and without reasonable

and probable cause, does not disentitle him to notice, because the statute (R. S. O. c. 73, s. 1) assumes that a public officer may so act, and it is of actions brought on that ground, among others, that the act provides that he is to have notice, see *per Parke, B., Kirby v. Simpson*, 10 Ex. 358. The question therefore on which the right of a public officer to notice of action turns, is not "whether or not the act complained of was done *mala fide*," but whether or not it was done by the defendant in his public capacity. If it were, he is entitled to notice even though he acted maliciously and without reasonable or probable cause. Sometimes it happens, however, to be a matter of controversy whether the act complained of was done in the execution, or assumed execution, of a public duty; and it is then a question for the jury whether or not the defendant *bona fide* believed, at the time of the doing of the act complained of, that he was acting in the discharge of his public duty: *Selmes v. Judge*, L. R. 6 Q. B. 724; *Cottrell v. Hueston*, 7 C. P. 277; but see *Ibbotson v. Henry*, 8 O. R. 625 *infra*. Where a person, not being a public officer, is entitled to notice of action under any statute, for anything done in pursuance thereof, he is only entitled to such notice in cases where he honestly believed in the existence of a state of facts, which, if it had existed, would have justified him in doing the act complained of: *Cann v. Clipperton*, 10 A. & E. 512; *Hermann v. Seneschal*, 13 C. B. N. S. 392; *Roberts v. Orchard*, 2 H. & C. 769; *Heath v. Brewer*, 15 C. B. N. S. 803; *Downing v. Capel*, L. R. 2 C. P. 461. It is not necessary that it should have been a reasonable belief: *Ib., Chamberlain v. King*, 6 L. R. C. P. 478, although there must at least be some facts to warrant it: *Ib.*, and see *Leete v. Harte*, L. R. 3 C. P. 322. In the latter case, a *semble* is added to the head note, to the effect that even an honest belief would be insufficient unless

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the defendant had reasonable grounds for such belief; but this was disapproved of by the judges in *Chamberlain v. King*, *supra*. But it has been said that the absence of reasonable grounds for belief is evidence of the non-existence of a *bona fide* belief on the part of the defendant that he was acting in discharge of his duty; *Booth v. Clive*, 10 C. B. 827, and see *Cox v. Reid*, 13 Q. B. 558; but it seems clear since *Chamberlain v. King*, *supra*, that the reasonableness of the grounds for the defendant's belief is not a question for the jury. It is not necessary that the defendant should have been cognizant of the Act giving him protection: *Read v. Coker*, 13 C. B. 850; *Danvers v. Morgan*, 1 Jur. N. S. 501. Where a public officer is sued for damages occasioned by his negligent omission to do something which it was his duty to do, it has been held that he is not entitled to notice of action, as the act complained of is not "an act done," but something not done. Thus a registrar of deeds who improperly omitted an instrument from an abstract was held not to be entitled to notice of an action brought to recover damages resulting to the plaintiff by reason of the omission: *Harrison v. Brega*, 20 U. C. Q. B. 324, and see *Ross v. McLay*, 40 U. C. Q. B. 83; *Harrold v. Simcoe*, 16 C. P. 43; and see *Dale v. Cool*, 6 C. P. 544, *infra*. But in *Wilson v. Halifax*, L. R. 3 Ex. 114; 37 L. J. Ex. 44; 17 L. T. N. S. 660, it was held that the negligent omission to do something which ought to be done in order to the complete performance of a duty imposed on a public body by an Act of Parliament amounts to "an act done or intended to be done in pursuance of the act," within the meaning of a clause requiring notice of action to be given to the public body. So also a mayor of a city, who was sued for refusing to sign an order to enable the plaintiff to obtain a license, was held entitled to notice: *Moran*

v. Palmer, 13 C. P. 528. In *Moran v. Palmer*, however, the rule laid down in *Harrison v. Brega* is approved, viz., that where what is complained of is a negligent omission to do what the defendant was called upon to do in discharge of the duty of his office, then no notice of action is necessary; but when the party refuses to do an act, and in that way carries out the law according to his erroneous idea of his duty, then he is entitled to notice. Having regard to the state of the authorities, however, it would probably be safer in cases such as *Harrison v. Brega*, to give the notice.

For a long time the former Common Law Courts of this Province were divided in opinion as to whether a corporation discharging a public duty was a "person" entitled to notice of action. The numerous cases in which conflicting decisions were given on this point are noted in Har. & Jos'. Dig. 33. The Court of Error and Appeal ultimately, in *Hodgins v. Huron*, 3 E. & A. 169, sustained the view of the Queen's Bench that they were not entitled to notice of action under the general act relating to actions against public officers; but the Municipal Act (46 Vict. c. 18, s. 340) now expressly provides that municipal corporations are to be entitled to notice of actions brought in respect of any act done under any by-law, order, or resolution, illegal in whole or in part, and the decision in *Hodgins v. Huron* is therefore to that extent superseded.

When a person is acting under the Division Court Act for his own private benefit, he has been held not entitled to notice. Thus where a person was sued for having maliciously sued out an attachment from a Division Court, he was held not entitled to notice of action under the Division Court Act: *Pall v. Kenney*, 11 U. C. Q. B. 350. So also a plaintiff in a Division Court action who had indemnified the bailiff, was held not entitled to any

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notice of an action brought for the wrongful seizure and sale of goods under the execution: *Dollery v. Whaley*, 12 C.P. 105; but the bailiff himself was held entitled to notice of an action, brought under such circumstances, notwithstanding he had been indemnified, and even though acting under a warrant not under seal: *Anderson v. Grace*, 17 U. C. Q. B. 96; *Sanderson v. Coleman*, 4 U. C. Q. B. 119; *Lough v. Coleman*, 29 U. C. Q. B. 367; *McCance v. Bateman*, 12 C. P. 469. In *McWhirter v. Corbett*, 4 C. P. 203, however, it was held that a sheriff sued for wrongful acts done under a *fi. fa.* issued in a private suit is not entitled to notice of action, and this was approved in *Moran v. Palmer*, 13 C. P. at p. 532; and, following *McWhirter v. Corbett*, it was held that an official assignee sued for trespass in taking and selling goods was not entitled to notice: *Archibald v. Haldan*, 30 U. C. Q. B. 30; but the learned judge who delivered the judgment of the Court, stated that but for the prior decision he would have come to a different conclusion. A Division Court bailiff, sued for wrongfully neglecting to pay over money levied by him in the course of his duty, is not entitled to notice of action, see *Dale v. Cool*, 6 C. P. 544; *McLeish v. Howard*, 3 App. R. 503.

A special constable sued for wrongful arrest is entitled to notice, R. S. O. c. 83, s. 22, *Sage v. Duffy*, 11 U. C. Q. B. 30, but not a private person who wrongfully gives another into custody, *Brooker v. Field*, 9 C. & P. 651—unless he be authorized to do so under the Crimes Act, 32 & 33 Vict. c. 29 (D.). A revenue officer sued for seizing goods in the course of his duty, or who conceives he has authority so to act, is entitled to notice, see the Customs Act, 46 Vict. c. 12, s. 226 (D.); *Wadsworth v. Morphy*, 1 U. C. Q. B. 190; and so is a person, not at the time of the seizure authorized to act as a revenue officer, but whose act is subsequently adopted by the

collector: *Wadsworth v. Morphy*, 2 U. C. Q. B. 120.

School trustees are also entitled to notice when sued for acts done in their corporate capacity, even though they may purport to act individually, if in fact they were acting in discharge of their duty as trustees: *Spry v. Mumby*, 11 C. P. 285. So also are collectors of school taxes, *ib.*, and arbitrators between school trustees and a teacher: *Kennedy v. Burness*, 15 U. C. Q. B. 487; *Hughes v. Pake*, 25 U. C. Q. B. 95. Poundkeepers are entitled to notice: *Davis v. Williams*, 13 C. P. 365. But a constable sued for wrongfully impounding sheep and cattle is held not to be entitled to notice: *Ibbotson v. Henry*, 8 O. R. 625. The correctness of this decision, however, we think, is open to doubt. One of the learned judges based his conclusion on the ground that the constable did not honestly believe that such a state of facts existed as would, if it had existed, have justified the taking and impounding of the cattle; and the other learned judge proceeded on the ground that it was no part of the duty of the defendant as a constable to take up and impound cattle. The real question, however, by which the right to notice should have been determined we take to be this: "Did the defendant in doing as he did act as a constable?" He may have altogether mistaken or exceeded his duty; but that we think, on the authority of *Chamberlain v. King*, L. R. 6 C. P. 478, is immaterial. Although, as we have seen, a registrar of deeds who is sued for damages resulting from his negligently omitting a document from an abstract, has been held not entitled to notice, yet a registrar sued for overcharges is entitled to notice: *Ross v. McLay*, 40 U. C. Q. B. 87.

It is not necessary to give notice of every action brought against a public officer. Notice is only necessary when the action is to recover damages for the wrongful act complained of. In actions

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of replevin notice is not necessary, although damages are recoverable therein for the goods which cannot be found to be replevied: *Folger v. Minton*, 10 U. C. Q. B. 423; *Manson v. Gurnett*, 2 P. R. 389; *Kennedy v. Hall*, 7 C. P. 218; *Applegarth v. Graham*, 7 C. P. 171; *Lewis v. Teale*, 32 U. C. Q. B. 108; and see *Ibbotson v. Henry*, 8 O. R. 625. Notice is not necessary when the action is for an injunction: *Flower v. Leyton*, 5 Ch. D. 347. Nor when it is brought against a registrar of deeds to compel the removal from the register of an instrument improperly registered: *Industrial Loan Co. v. Lindsey*, 4 O. R. 473, 3 O. R. 66.

We have now to consider how the objection of want of notice of action must be raised. The true rule appears to be, that where the defendant is entitled to plead, and does plead "not guilty by statute," it is not necessary to plead specially the want of notice (see Rule 145). But in all other cases the want of notice must be specially pleaded. In *Dale v. Cool*, 4 C. P. 460, and *Pearson v. Ruttan*, 15 C. P. 79, it was expressly held that the defence is available under the plea of "not guilty by statute," and see *Hermann v. Seneschal*, and *Roberts v. Orchard*, *supra*. It is not, however, available under a simple plea of "not guilty," *Timon v. Stubbs*, 1 U. C. Q. B. 347; *Verratt v. McAulay*, 5 O. R. 313; *McKay v. Cummings*, 6 O. R. 400. In *Fowke v. Robertson*, 6 O. S. 572, however, the objection appears to have been allowed though not pleaded specially, and it does not appear from the report that a plea of "not guilty by statute" was on the record; and, in *Davis v. Moore*, 4 U. C. Q. B. 209, Macaulay, J., referring to Tyrwhitt's Plgs., seemed to think that the objection might be taken under a plea of "not guilty," though not pleaded "per statute." This, however, was a mere dictum. In *McLeish v. Howard*, 3 App. R. 503, there was a plea of "not guilty by statute" on

the record, as appears from the printed appeal book, but the Court of Appeal, without apparently much consideration of the subject, seems to have thought that the defence of want of notice was not available thereunder; but this expression of opinion was a mere dictum, and not necessary for the decision of that case.

The objection of want of notice must be taken at the trial: it will not be allowed to be taken for the first time on a motion to set aside the verdict: *Armstrong v. Bowes*, 12 C. P. 539; *Moran v. Palmer*, 13 C. P. 528. But when a new trial has been ordered, the objection of want of notice, though not taken at the first trial, may be raised on the new trial: *Bross v. Huber*, 18 U. C. Q. B. 282; *Nevill v. Ross*, 22 C. P. 487. In Taylor on Evidence (8th ed.) 54, it is said that the question whether a defendant is entitled to notice of action is a question for the judge, and the learned author refers to *Arnold v. Hamel*, 9 Ex. 404, and *Kirby v. Simpson*, 23 L. J. M. C. 165; but a reference to *Arnold v. Hamel* will show that that case turned upon the peculiar wording of the statute under which the notice was required, and which virtually precluded any evidence being submitted to the jury unless notice was first proved, and *Kirby v. Simpson* is no stronger authority. Neither case, we think, establishes a rule of universal application. It would perhaps be more correct to say that where the question of the right to notice is a mere question of law it is for the judge alone, but where the question turns on a disputed question of fact, then that question of fact must be submitted to the jury, and upon the fact so found the judge must determine the law. For example, where the statement of claim shows on its face that the action is brought against the defendant for something done by him in the execution of a public office held by him, or where this fact appears by the plaintiff's own evidence, then the question

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whether the defendant is entitled to notice on the facts alleged or proved by the plaintiff, would clearly be for the judge alone. But where it does not appear by the plaintiff's pleading or evidence that the defendant is sued for anything done under circumstances entitling him to notice, but the question depends on a disputed question of fact as to whether or not the defendant in doing the act complained of was in fact acting in his public capacity, or in the *bona fide* belief that he was authorized to do as he did by any statute entitling him to notice; then that question of fact must be submitted to the jury subject to the limitation laid down in *Chamberlain v. King*, *supra*, viz., that in determining the question of a defendant's belief, they are not to be influenced by the consideration whether he had reasonable grounds for it or not.

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The Law Reports for October comprise 15 Q. B. D. pp. 401-440, and 29 Chy. D. pp. 893-1,017.

SIX MONTHS' NOTICE—HALF-YEAR'S NOTICE.

Taking up the Queen's Bench Division cases first, the first case to be noted is that of *Barlow v. Teal*, 15 Q. B. D. 403, in which a Divisional Court, composed of Coleridge, C. J., and Field, J., held that an agreement to terminate a tenancy from year to year upon a six month's notice being given, is not equivalent to an agreement for a half-year's notice. Most people ignorant of law would no doubt conclude that six months and half a year are convertible terms; but, owing to the inequalities in the lengths of the calendar months, this is clearly not the case—six calendar months frequently comprise only 181 days, and in some cases they include as many as 184 days.

SOLICITOR AND CLIENT—TAXATION—UNUSUAL PROCEEDINGS.

In the case of *In re Broad v. Broad*, 15 Q. B. D. 420, the Court of Appeal affirm the decision of the Divisional Court, 15 Q. B. D. 252, noted *ante*.

SECURITY FOR COSTS—DEFENDANT OUT OF JURISDICTION—COUNTER-CLAIM.

Sykes v. Sacerdoti, 15 Q. B. D. 423, is a decision of the Court of Appeal affirming a decision of the Divisional Court (Grove and Denman, JJ.) on a question of practice. The plaintiff in the action obtained leave to sign judgment for part of his claim, and leave was given to the defendant to defend as to the residue. The defendant, who was resident out of the jurisdiction, filed a counter-claim. The plaintiff then applied for leave to discontinue the action as to the residue of his claim and to stay proceedings on the defendant's counter-claim until he should give security for costs. An order was made on these terms which was afterwards affirmed by the Divisional Court, and which the Court of Appeal now affirm. The Master of the Rolls says: "When a claim and counter-claim arise out of different matters, the counter-claim is really a cross action, though for convenience of procedure the two are joined together. . . . In such a case the ordinary rule applies, and the Court is entitled to require the defendant, who is really an actor as regards the counter-claim to give security, if he is out of jurisdiction, for the costs which will be occasioned to the plaintiff by his counter-claim."

AGREEMENT TO APPOINT VALUERS—ARBITRATION—MAKING SUBMISSION RULE OF COURT.

The next case of *Re Dawdy*, 15 Q. B. D. 426, is a decision of the Court of Appeal affirming the opinion of a Divisional Court, composed of Coleridge, C. J. and Mathew, J. By an agreement between landlord and tenant it was provided that the tenant should be paid, at the expiration of the tenancy, the usual and customary valuation as between outgoing and incoming tenant in the same manner as he paid on entering the premises. And it was thereby agreed that when any valuation of the covenants should be made, the persons making the valuation should take into consideration the state, condition and usage of the farm; if not left in a proper and creditable state, should state what sum of money should be paid to the landlord as compensation therefor, and should deduct such sum from the amount of the valuation. On the expiration of the tenancy, there being no incoming tenant, the landlord and tenant respectively ap-

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pointed a valuer. The valuers, not being able to agree, appointed an umpire who held a sitting, heard witnesses, and made an award in writing. The tenant, with the view of obtaining an order to remit the matters in dispute to the umpire for reconsideration, applied for an order to make the submission to arbitration contained in the agreement, together with the appointment of arbitrators and umpire, a rule of Court under the C. L. P. Act. But it was held that the agreement did not contain any submission to arbitration, but that it only provided for the appointment of valuers, and that it could not therefore be made a rule of Court. The ground of the decision may be gathered from the following observations which we extract from the judgment of Lord Esher, M. R.:

"The word 'arbitration' in s. 17 of the Common Law Procedure Act has been construed as meaning an arbitration to be conducted according to judicial rules, when the person who is appointed arbitrator is bound to hear the parties, to hear evidence if they desire it, and to determine judicially between them. He must have a matter before him which he is to consider judicially. As a consequence of this, it has been held that if a man is, on account of his skill in such matters, appointed to make a valuation in such a manner that in making it he may, in accordance with the appointment, decide solely by the use of his eyes, his knowledge and his skill, he is not acting judicially; he is using the skill of a valuer, not of a judge."

In the present case the Court was of opinion that the agreement only provided for the appointment of valuers and not arbitrators, and therefore there was no power in the Court to make the agreement a rule of Court.

DISCOVERY—LIBEL—COMPARISON OF HANDWRITING.

The only remaining case in the Queen's Bench Division which requires notice is that of *Jones v. Richards*, 15 Q. B. D. 439, which appears to be a decision of the Court of Appeal. The action was one for a libel contained in an anonymous letter, and the question was whether the defendant was bound to answer an interrogatory as to whether or not he was the writer of another letter addressed to a third person, and it was held that he was bound to do so. Lord Coleridge, C. J., says:

"The answer could be got from the defendant in the witness box in chief. The plaintiff would clearly have a right to put another document in the defendant's hand and ask him if that was in his

handwriting. If the answer were in the affirmative it might be cogent evidence that he also wrote the letter in question in the cause; and so it becomes relevant."

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TRINITY TERM, 49th VICT., 1885.

The following is the resumé of the proceedings of the Benchers on the 30th June, and during Trinity Term, published by authority.

During Trinity Term the following gentlemen were called to the Bar, namely:—

Messrs. George Morehead, Angus Claude Macdonell, John Jackson Scott, Angus MacMurchy, Leonard Hugh Patten, Spencer Love, James Baird, Philip Henry Simpson, Charles Julius Mickle, Louis Martin Hayes, Stephen Ormond Richards, Edward Wm. Murray Flock, David Fasken, Sanford Dennis Biggar, George Hamilton Jarvis, John Alfred McAndrew, Archibald Gilchrist Campbell, Joseph Priestly Fisher, George Cory Thomson, Henry Thomas Shibley, Douglas Alexander, John Baldwin Hands, Stephen O'Brien, Ambrose Kenneth Goodman, Willoughby Staples Brewster, John Armstrong, John Shilton, John Strange, Henry Brock, Daniel Hugh Allan, Alexander George Murray, Francis Wolferstan Goodhue Thomas, John Frederick Grierson, Henry Walter Mickle, Francis Arthur Eddis, George Sandfield Macdonald, George Hiram Capron Brooke, Albert John Flint, Donald Macdonald Howard, John Andrew Forin.

The following gentlemen were granted Certificates of Fitness as Solicitors, namely:—

Messrs. A. Carruthers, W. S. Brewster, A. MacMurchy, A. E. O'Meara, J. Shilton, P. H. Simpson, S. Love, G. H. Jarvis, S. D. Biggar, J. Baird, J. A. McAndrew, C. J. Mickle, J. Armstrong, T. E. Parke, D. Alexander, J. D. S. C. Robertson, D. F. McArdle, F. E. Redick, W. H. Robinson, S. O'Brien, T. C. L. Armstrong, E. A. Langtry, R. J. Dowdall, H. Brock, D. H. Allan, J. F. Grierson, F. W. G. Thomas,

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H. W. Mickle, G. H. C. Brooke, A. J. Flint, D. McD. Howard, J. A. Forin.

The following gentlemen passed their First Intermediate Examination, viz. :—

R. J. McLaughlin, with honors, and first scholarship; A. P. McDonell, with honors, and second scholarship; J. M. Young, with honors, and third scholarship; and Messrs. F. H. Kilbourne, F. P. Henry, C. Horgan, F. A. Anglin, H. R. Welton, A. Macnish, T. Browne, R. J. Leslie, J. A. Davidson, W. Lawson, E. H. Ridley, M. Wright, J. B. Davidson, S. W. Perry, T. Steele, A. F. May, W. H. Campbell, E. H. Jackes, J. M. McWhinney, A. Saunders, T. R. Ferguson, J. H. Kew, H. O. E. Pratt, G. L. Lennox, W. G. Munro, W. S. Turnbull.

The following gentlemen passed their Second Intermediate Examination, viz. :—

J. H. Reeves, with honors, and first scholarship; A. E. Swartout, with honors, and second scholarship; W. Chambers, with honors, and third scholarship; and Messrs. G. H. Kilmer, J. F. Lyall, A. W. Fraser, E. J. B. Duncan, R. C. Donald, T. A. McGillivray, D. G. Marshall, H. S. Osler, E. Considine, G. A. Loney, J. B. Dalzell, W. Whittaker, A. Fraser, R. H. Pringle, J. W. Bennett, J. L. Peters, J. R. Shaw, J. Elliott, A. J. Arnold, J. P. Eastwood, D. C. Hossack, L. Lee, J. A. Mills.

On 30th June, the following candidates were admitted as Students-at-Law as of the first day of Easter Term, viz. :—

Graduates.—Robert Maxwell Dennistoun, Heber James Hamilton, John Gumaer Holmes, Gordon Hunter Matthew Ford Muir, John Irving Poole, William W. Vickers. And on the first day of Trinity Term the following candidates were admitted.

Graduates.—Clifford Kemp, William Smith, Albert Ed. Kingsley Grier, Evan John MacIntyre, Alex. Doffs Cartwright, James H. Macnee, Horatio Venice Lyon, Stuart Alex. Henderson, Wm. Craig Chisholm, James Albert Collins, Herbert Edward Irwin, Edward Herbert Johnston, John Kyles, Robt. Osborne McCulloch, William Henry Walker, Thomas Walmsley, Henry Blois Witton, James Alex. Victor Preston, Alfred Burke Thompson.

Matriculants.—John Bell Holden, Walker Lewis E. Marsh, Frank William Maclean, Dudley Holmes, Augustus Jas. Jackson Thibaudeau.

Juniors.—D. A. McKillop, S. H. Brooke, E. G. P. Pickup, W. McKay, G. B. Carroll, W. J. Hanna, P. H. Bartlett, I. Greenizen, W. York, H. D. Macdonald, J. F. Keith, A. F. Wilson, J. Knowles, T. W. Scandrett, J. J. McPhillips, W. F. Smith, H. V. H. Cawthra, A. C. Boyce, O. E. Fleming, W. A. Smith.

TUESDAY, 30th JUNE, 1885.

Convocation met.

Present—Messrs. Beaty, Bell, Britton, Ferguson, Foy, Guthrie, Hoskin, Irving, McKelcan, Macleannan, Martin, Morris, Moss, Murray, McMichael, Smith, L. W.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

Mr. Moss, from the Legal Education Committee, reported the names of the candidates who, under the new rule of 29th May last, were entitled to be admitted into the Society as Students-at-Law in the Graduate Class, as of Easter Term.

The report was received and read.

Ordered for immediate consideration and adopted.

A letter was read from Mr. J. F. Smith, dated 10th June, 1885, resigning his seat as a Bench.

Ordered, that a call of the Bench be made for Tuesday 8th September, to fill the vacancy created by Mr. Smith's resignation.

Mr. James F. Smith was elected Editor-in-Chief of the Law Reports.

Ordered, that in view of the valuable services rendered to the Profession and Convocation by Mr. David B. Read, Q.C., lately, and for twenty-nine years continuously as Bench, as Lecturer and as Chairman of the Finance Committee, and otherwise, the sum of two thousand dollars be paid to him as a remuneration for such services. Carried unanimously.

Convocation adjourned.

MONDAY, 7TH SEPTEMBER, 1885.

Convocation met.

Present—Messrs. Blake, S. H., Crickmore, Ferguson, Irving, Kerr, Macleannan, Murray, Moss and McMichael.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

The petitions of Messrs. Eddis, Langtry, Brock, Kershaw, Gibson, S. A. Jones, G. H. Douglas, H. W. Mickle, Forin, Grierson, Murray, Howard, G. H. C.

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Brooke and Thomas were referred for consideration to the Legal Education Committee, to ascertain whether they came within the resolution of Convocation of Easter Term, and to report generally upon the petitions now referred to them. Convocation adjourned.

TUESDAY, 8TH SEPTEMBER, 1885.

Convocation met.

Present—Messrs. Blake, S. H., Britton, Crickmore, Ferguson, Foy, Hoskin, Huds-
peth, Irving, McKelcan, MacLennan,
Martin, Meredith, Morris, Moss, Murray,
McCarthy, McMichael.

Mr. Irving was appointed Chairman in place of the Treasurer, who was absent.

The Legal Education Committee, presented their report on the cases of students and articled clerks, who had been on service with the volunteers in the North-West.

The report was received, read, considered and adopted.

Ordered, that the resolutions passed by Convocation on the 19th May (Easter Term) last, relating to the volunteers ordered out, in consequence of the rebellion in the North-West Territories, be extended so as to include the present term, and embrace within their scope all students-at-law and articled clerks who had entered on such military service, at any time before or after their adoption, and notwithstanding they may not have given notice, and that the same shall apply as regards such students and clerks to any examination for the present term, notwithstanding such students or clerks, have now been discharged from active service.

Ordered, that upon the representation of Mr. Hudspeth, the above resolutions shall apply to Mr. Alexander Skinner upon his attaining the full age of twenty-one years, he having passed all his examinations except those for call and for admission as a solicitor, and having been on military service in the North-West during the whole campaign, and whose period for call and time for solicitor have expired, and who cannot now avail himself of the said resolution, because he has not attained the full age of twenty-one years.

Mr. MacLennan, from the Special Committee, presented their report on the case of Mr. G. L. Taylor, a barrister from Manitoba, recommending that he be called

to the Bar, he having passed the special examination. The Committee further recommend that he be required to pay the ordinary fees only.

The report was received, read and considered. The first clause was carried, the second clause was struck out. The report as amended was adopted.

The following gentlemen were elected Benchers of the Law Society, to supply vacancies of the Bench, viz.: Mr. Christopher Robinson, Mr. Thos. H. Purdom, Mr. A. S. Hardy, Mr. T. B. Pardee, Mr. W. G. Falconbridge.

Pursuant to notice given by Mr. Murray, The following resolution was moved, that the prizes of \$25 and \$15, which were competed for in April last, be awarded to W. D. McPherson and J. M. Clarke, they having obtained the requisite number of marks.

Ordered, that the subject-matter of the resolution be referred to the Legal Education Committee for report on the facts.

Convocation adjourned.

SATURDAY, 12TH SEPTEMBER, 1885.

Convocation met.

Present.—Falconbridge, Ferguson, Foy, Hoskin, Irving, MacLennan, Morris, Moss, Murray.

Mr. Irving was appointed Chairman in the absence of the Treasurer.

Mr. Moss, from the Legal Education Committee, reported as follows, namely:

That the following students and articled clerks, who had been on military service in the North-West, were entitled under the resolutions adopted by Convocations in that behalf to be called to the Bar, and to receive Certificates of Fitness, namely: Messrs. D. H. Allan, F. W. G. Thomas, H. W. Mickle, John Frederick Grierson.

That Messrs. F. A. Eddis and G. S. Macdonald, were entitled to be called to the Bar.

That the cases of Messrs. Brooke, Flint, Morris, Blake, Howard and Forin, were reserved for further consideration, their papers not being complete.

That Mr. Dowdall's papers had been examined, and the proof of the completion of his service found satisfactory, and his Certificate of Fitness issued. The report was received and adopted.

The report of the Special Committee

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to strike standing committees recommending that Mr. Falconbridge be put on the Reporting Committee, Mr. Robinson, on the Legal Education Committee, Mr. Purdom on the Finance Committee, Mr. Hardy on the County Libraries Committee and Mr. Pardee on the Journals and Printing Committee was received, read, considered and adopted.

The Secretary's report on the Intermediate Examination cases reserved from Easter Term was received, read and adopted.

Ordered, that the examinations named in the report be allowed them as of Easter Term last in accordance with the report, and that the same be duly recorded.

Convocation adjourned.

J. K. KERR,

Chairman, Committee on Journals.

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AN EARLY CRIMINAL TRIAL.

IN the course of recent reading I came across an amusing and instructive account of a criminal trial occurring in England about six hundred years ago (say, A.D. 1302), and but a few years, comparatively, after the enactment of Magna Charta. It not only illustrates the manners and customs of the time, but sheds light on the mode of making use of "benefit of clergy," of "trial by one's peers," of challenging jurymen, of refusing counsel to prisoners on trial for felony, and of judicial protection and countenance to an abashed prisoner, which are in some respects the glory, and in others the shame of English criminal law.

The account of the trial is in Latin, and I have ventured to give a free translation of it. The reporter of the case performs a peculiar function in making side remarks as he goes along, by way of criticism and suggestion. I shall follow his practice, and, in passing, throw in some modern explanations.

Curiously enough, though the account of the trial is perfectly authentic (being found in ancient English Court papers), neither the name of the judge, nor of the

prisoner, nor of the reporter is ascertainable. Nothing is known of the prisoner except that he is "Sir Hugh," and a knight, presumably of "gentle blood." For convenience' sake, the various actors will bear assumed names, taken from the same old papers, also illustrative of the times. The prisoner will appear as Sir Hugh Bad; the judge, as "his honour, Judge Tynterel;" and the reporter as "Adam Worry." Sir Hugh had a serviceable friend, whose name was "Leyr," a personage useful in Court matters even in our own day.

The case opens with a presentment by "the twelve of Y" (apparently acting as a grand jury) to the effect that Sir Hugh had committed the offence of rape, with the usual legal statements and descriptions of the offence. He was thereupon brought to the bar (*ad barram*) by two persons, perhaps his bail. Tynterel thereupon said to one of them, named Brian: "I understand that this man is your relative; you may stand by him and give him your countenance, but you must not advise him." Brian replied: "That is true, he is my relative; but, that I may not be suspected of having anything to do with the controversy, I will take my leave." And so this very prudent and circumspect relative departed. Then Tynterel said to the prisoner, "Sir Hugh, there is a presentment against you, that you have committed the crime of rape, etc.; how do you propose to defend yourself?" Then Sir Hugh: "Your honour, I ask for counsel. Give me counsel, that I may not be tripped up in the king's Court for want of counsel." Then said Tynterel: "You ought to know that the king is a party in this case, and prosecutes you *ex officio*, and in such a case the law does not permit you to have counsel against the king—indeed, if the woman had been prosecuting you, you should have had counsel against her, but not against the king. Accordingly I now order, in behalf of the king, that all the pleaders who are here in order to be of your counsel shall depart." Mr. Worry then interposes that all the counsel are removed.

Tynterel resumes: "Hugh, respond; the deed charged against you is possible, it is your own deed, and you can respond very well without counsel, whether you committed it or not. The law is common

SELECTIONS.

to all, and must be uniformly administered, and the law is that when the king is a party *ex officio* you shall not have counsel against him." He then proceeds to make this remarkable statement, which he must apparently have done in a manner not audible to the bystanders, while he was certainly heard by the inquisitive Mr. Worry. "If I, in opposition to the law, should give you counsel, and the 'country' (meaning the jury) should be with you, as, please God, they may, then the common talk would be that you had been set free by the favour of the justice. So I do not dare to award you counsel, and you ought not to ask it; so answer." Sir Hugh said no more about counsel.

This absurd and barbarous rule, denying a prisoner charged with a felonious crime the privilege of stating his case by counsel, rooted in the very outset in the system of trial by jury, continued unchanged in England, except in cases of high treason, down to the memory of men now living. There was a preposterous idea prevailing that the judge should be, as it were, counsel for the prisoner. The rule applied to all—to the ignorant, the deaf, the young. Nothing, however, could shake the rule until it met with the terrible and scathing invectives of Sydney Smith in the *Edinburgh Review*, in 1826, where he maintained at length the proposition, set forth with italics, that a prisoner accused of felony ought to have the same power of selecting counsel to speak for him as he has in cases of treason and misdemeanour, and as defendants have in all civil actions. This seems almost incredible.

Counsel were allowed for the first time by 6 & 7 Wm. IV. c. 114 (1836-37).

It is very noticeable that the justice in the present case feared to allow counsel because of the public opinion of the time. The people demanded an impartial administration of the laws against knights and nobles as well as common men. The judge did not dare to face the opinion. A sound public opinion was then, as now, a healthy check upon the administration of criminal justice.

Sir Hugh next takes up his defence, and instead of pleading not guilty, he pleads in opposition to the jurisdiction of the Court. He played the following card. He said: "Your honour, I am a clergy-

man, and I ought not to be called on to respond without my 'ordinary' " (meaning the bishop, or ecclesiastical superior). "Then," said the judge, apparently astonished, "are you truly a clergyman?" Whereupon Sir Hugh replied: "It is true; I have been a rector of the church of N." Then the bishop appeared in Court, and said to the judge: "I demand him as a clergyman." Whereupon Sir Hugh cried exultingly, "You hear what he says." "But," said the judge, "I say that you have lost the 'benefit of the clergy,' because you are 'bigamous,' that is you married a widow, and you must answer whether, when you married your wife, she was a virgin or not, and you may as well tell the truth at once as to seek any evasion, for I shall immediately submit the matter to the country" (the jury). We may hope that Sir Hugh, being a knight, was a man of truthful disposition; but he was on trial for a vile crime, and, if convicted, subject to a terrible punishment, involving personal mutilation. So he put a bold face upon the matter, and said without the quiver of a muscle, "My wife was a virgin when I espoused her." Then said Tynterel: "I must find out the truth of this matter right away." So the reporter says he asked "*the twelve*," and they declared upon their oath that she was a widow when Sir Hugh married her. Mr. Worry thereupon remarks that it was a noteworthy thing that Tynterel did not administer a cumulative oath to jury for this purpose. Then the Court said, "You must respond not as a clergyman but as a layman, and you must submit yourself to these twelve 'honest men,' who are unwilling to lie for the king."

This is certainly a very graphic description of the way in which even a man of military rank would strive to pass himself off as a clergyman, in order that he might escape the dreadful severities of a criminal trial and punishment in the king's Court. Had Sir Hugh been successful in his plea to the jurisdiction of the Court, he would have been handed over to the bishop who claimed him. His trial before him would have been a farce. At most, if convicted, he would have been sentenced to be branded in the hand, and the sentence would very likely have been carried out with a *cold iron*. This it was to have "benefit of clergy," and this

SELECTIONS.

existed down to the time of the American Revolution, when a new plan of punishment by imprisonment and transportation to a penal settlement took the place of the former barbarous methods (applicable to the laity), while unmeaning privileges were swept away, and the same rules of punishment were applied to all, without distinction of clergy and laity. When the case now in hand was tried, the distinction between the two classes was a real one; before it was abolished it was merely a line drawn between those who could read and those who could not. The case seems to show that a clergyman then could be married, except to a widow, but whether this was canon law or only Tynterel's law may be open to discussion.

Sir Hugh, baffled in his plea of being a clergyman, tries another plan. He objects to the jury, who are ready in Court to try the case. He makes two points: one is that he is *accused* by them, and that accordingly he will not consent to be *tried* by them. The meaning of this would seem to be that the *same men* are assuming to act both as a grand jury and a petty jury. Then, observing that they are men of inferior rank, perhaps yeomen or farmers, he says: "Your honour, I am a knight, and will not be judged except by my peers" (*pares*). To this Tynterel replies: "Since you are a knight, I direct that you be tried by your peers." So knights are summoned to try the case. Then Tynterel says further to Sir Hugh: "Do you desire to propose any challenges in respect to them?" Sir Hugh replies: "I do not agree to them; you may take whatever inquisition you desire *ex officio*, but I will not agree to them." To this Tynterel responds: "If you will consent to them, with the help of God they will act in your case; but if you will not, and refuse to follow the rules of the common law, you will suffer the regularly ordained punishment—viz., one day you will be allowed to eat, and the next day to drink, but the day that you eat you shall not drink, and *vice versa*. When you eat you shall have barley bread without salt, and the day you drink water," etc. Mr. Worry pauses at this point, and remarks that the judge said "many other things," showing why it would not be a good thing for him to adhere to his refusal, and why it would be better to consent. Sir Hugh

took the hint, and said: "I will consent to be tried by my peers, but not by these twelve by whom I am accused. Be kind enough to have my challenges read." To this the judge said: "Gladly; let them be read, or, if you can state any ground why the twelve should be removed, proceed orally." Then Sir Hugh: "I *desire counsel*, for I cannot read." Tynterel responds: "No; for this affects our lord, the king." To this, Sir Hugh: "Then you may take the challenges and read them." Tynterel: "No; for they must come from your own mouth." Sir Hugh: "I cannot read." Tynterel then wakes up and says: "How is this, Sir Hugh? It is but a few minutes ago that you were claiming the 'benefit of clergy,' and you were even rector of a church, and now you say you cannot read! Oh, fie!"

At this point the good reporter, Worry, interjects a remark to the effect that Sir Hugh stood silent, abashed and confused. Tynterel now tries to cheer him up by saying: "Be not abashed: now, if ever, is the time to speak." Then the justice turns to Sir Hugh's friend, Leyr, saying: "Would you not like to read the challenges of Sir Hugh?" To which Leyr answers: "Yes, your honour: if I only had the book which he holds in his hands." This was allowed. Then Leyr said: "Here are challenges against many of the jury. Do you wish that I should read them publicly?" Tynterel replies: "No; read them to the prisoner secretly, because they must be uttered by his mouth." And so it was done, and the challenges turning out to be true, all the disqualified jurymen were removed and others substituted. The jury being obtained, Tynterel said to them: "Sir Hugh is charged with the crime of rape. He pleads not guilty, and he is asked how he desires to be tried, and he says by the 'country' (*per bonam patriam*), so he places himself upon your decision for better or for worse. So we enjoin you to declare upon your oath whether Sir Hugh committed the offence with which he is charged or not." The twelve men say: "We declare that the woman was ravished by the 'men' of Sir Hugh." Then Tynterel: "Was Sir Hugh consenting to the crime?" The twelve: "No." Some other questions being asked and answered, which brought out the fact that there was no ravishment, the judge

finally said: "Sir Hugh, because they (the twelve) acquit you, I acquit you."

This extraordinary trial is of the highest interest, as showing trial by jury in its earliest infancy. No authentic case dates so far back as this. There seems to be a mystery hanging about this form of trial in the minds of the men of the time. The triers are "the twelve;" they are the "country," the "good country," "twelve honest men." They are but seldom called a jury. The case shows that the word "peers" in the Great Charter meant political equals, and that even a knight might demand a jury of knights. Further, there could be no trial of the facts unless the prisoner entered a plea of "not guilty." If he would not plead, he must be made to plead, by subjecting him to extreme torture in regard to want of food and drink, and in other respects, which the reporter refrained from disclosing. This was the *peine forte et dure* of later days, when a prisoner who would not plead, in addition to a daily supply of a few morsels of loathsome food and a few draughts of the vilest water, was to sustain constantly upon his person as great a weight of iron as he could bear, and more, and this until he died, unless he soon answered. This continued to be law until 1828, when, if a prisoner refused to plead, the humane practice of entering the plea of "not guilty" was adopted. The case further shows that the judges were inclined to administer the law as humanely as its rules would allow, and that a verdict of acquittal was deemed to be final. The system of challenging jurymen for unfitness, now so well established, was at that early day in existence, though with this singular qualification, that the challenges must come from the prisoner's own mouth, though they might be read to him to refresh his memory. There is in this trial a complete absence of formality. Question and answer pass between judge and prisoner, judge and jury, and judge and bystander in rapid succession. Subterfuges are speedily detected, and the kernel of the case soon reached. On the whole, the judges of the olden days set a good example to those of our time in regard for law, respect for an impartial public opinion, kindness to a prisoner on trial, grasp of questions involved, and due regard for the acts and verdicts of the mysterious

"twelve" who then, as now, could in general be relied upon to bring a popular, and because popular, salutary element into the administration of criminal justice. Though the law was severe, and the punishments barbarous, nothing else could effectually quell the powerful ruffians who filled the neighbourhood with terror, and dominated all things, except the king when in the field, or when meting out, through the medium of the judges, retributive justice in its most awe-inspiring forms.—THEODORE W. DWIGHT, in the *Columbia Jurist*.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

CHANCERY DIVISION.

Ferguson, J.]

[October 5.]

BEATY v. HALDAN.

Solicitor and client—Costs—One city solicitor doing work for another on agency terms.

In a certain suit of *Wilson v. Wilson*, D. acted generally as solicitor for H. who had been appointed administrator *pendente lite*. In certain matters, however, in connection with the suit, D. advised H. to retain another solicitor, deeming it improper to act himself for H. in respect to those matters, as he was also acting for another party. The solicitor thus retained by H. agreed with D. to do the work which he was retained to do for agency charges of which he rendered D. an account. D. made up one bill of costs and rendered it to H., which included at full rates the services which the other solicitor had performed at agency rates. H. paid the bill with these charges to D.

Held, that the Master, on taking H.'s accounts with respect to the estate of which he had been appointed administrator, should have allowed the bill as properly paid so far as concerned the said charges, for there was nothing improper in the transaction.

Moss, Q.C., for the appellant, Haldan.

O'Donohoe, Q.C., for the plaintiff.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Ferguson, J.]

[October 5.]

RE CROWTER, CROWTER V. HINMAN.

Executors—Misappropriation by co-executor.

When D. H., an executor under the will of P. S. C., by tacit consent of his co-executors took the actual management of the estate, and received all the moneys arising from it, including the purchase money of certain of the real estate sold pursuant to the will, and misappropriated the latter,

Held, that a co-executrix, who had joined in the conveyance to the purchaser, but who was not shown to have known that there was a balance of the purchase money in the hands of D. H. after the purposes of the will had been satisfied, viz., the payment of debts and incumbrances; or that he was misappropriating in any way, was not liable to make good the moneys so misappropriated by D. H.

Held, also, that even if she had been liable for the principal of such moneys, she would not have been liable for the interest, as the money never came into her hands at all.

McCarter v. McCarter, 7 O. R. 243, distinguished.

Moss, Q.C., for appellant.

J. Kerr, for respondents.

Boyd, C.]

[October 14.]

EASTMAN V. THE BANK OF MONTREAL
ET AL.

Assignment—Proof of claims—Collateral securities—Giving credits for amounts received on collaterals—Up to what time.

F. agreed with the Bank of M. for a line of credit to be secured by the discount of certain bills and notes which he had himself discounted, and which he endorsed and delivered to the Bank. He also arranged with the M. Bank to discount his notes to be secured by the deposit of his customers' notes as collaterals. F. then failed, being largely indebted to both banks, and made an assignment for the general benefit of his creditors. In proving their claims on his estate before the assignee, the banks contended that they were only bound to give credit on the amount of their claims for sums received on the collateral securities up to the date of the assignment. In an action

by another creditor on behalf of himself and all other creditors entitled to share under the assignment against the banks and the assignee, it was

Held, following *Rhodes v. Moxhay*, 10 W. R. 103, that a creditor is entitled to prove for the whole amount of his debt, and to take a dividend upon the whole without prejudice to his rights against securities he may hold, subject, of course, to this qualification that he must not ultimately receive more than twenty shillings on the pound; to hold otherwise would be virtually to deprive the secured creditor of any advantage from his security. The state of the accounts at the time the claim is put in is that which forms the basis of the dividend sheet, and the amount is to be fixed by the assignee as at that date; any moneys received prior to that from collaterals are to be credited; those received after from such sources need not be taken into account, unless they, with the dividend, bring up the amount received by the creditor to 100 cents on the dollar.

That substantially both banks were in the same position as to the securities in their hands.

That there was a distinct contract for a line of credit to the debtor by the Bank of M., and as long as that line was not exceeded the bank could prove on the footing of that contract as the original debt and hold the customers' notes discounted in pursuance of that contract as securities.

Meredith, Q.C., for the plaintiff.

Street, Q.C., for the Bank of Montreal.

Gibbons, for the Merchants' Bank of Canada.

Moorhead, for defendant, Lucas, the assignee.

Boyd, C.]

[October 14.]

BURNS AND LEWIS V. MACKAY ET AL.

Fraudulent preference—Necessity of intent to defraud on both sides.

The weight of authority greatly preponderates in favour of the view that in order to work a fraudulent preference of a creditor under R. S. O. c. 118 there must be a concurrence of intent so to do on the part of both debtor and creditor, and the rule of the Court is not to act upon mere suspicion in the absence of affirmative evidence of fraud, or of controlling

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

circumstantial evidence leading to that conclusion. *Fry v. Knox*, 8 O. R. 648, declared to be overruled.

Gibbons, for plaintiff.

Meredith, for J. S. Mackay.

Mulhern, for J. Sutherland.

PRACTICE.

Wilson, C. J.]

[Oct. 12.]

WALLER V. CLARIS.

Notice of motion—Irregularity—Costs.

Where the defendant's solicitor was served with a short notice of motion which, on the return, was admitted to be defective,

Held, that the defendant was not entitled to the costs of counsel attending on the motion merely to show that the notice was irregular.

Hoyles, for the plaintiff.

F. E. Hodgins, for the defendant.

Mr. Dalton, Q.C.]

[Oct. 12.]

PEEL V. WHITE.

Limited defence—Appearance—Statement of claim—Rule 68, O. J. A.

The defendant entered an appearance under Rule 68, O. J. A., limiting his defence to one item in the particulars endorsed on the writ of summons.

Held, that after such appearance a statement of claim was unnecessary, and a judgment signed upon a statement of claim for default of a statement of defence was set aside with costs.

Hoyles, for the defendant.

McPhillips, for the plaintiff.

Boyd, C.]

[October 14.]

ORPEN V. KERR.

Examination—Production of documents—Special examiner—Rule 285, O. J. A.—G. O. Chy. 147.

The powers of the special examiner under G. O. Chy. 147, as to directing the production of documents, extend to examinations under Rule 285, O. J. A.

Upon an examination of a party under Rule 285, at a stage of the action earlier than an examination will be ordered as of course, only material documents should be produced—such as would be produced in the ordinary course at a later stage.

A. H. Meyers, for the plaintiff.

C. H. Ritchie, for the defendant.

Boyd, C.]

[Oct. 14.]

ROGERS V. LOOS.

Retaining money in Court—Defence—Security for costs.

The statement of defence set up that the assault complained of was in self-defence, and, as an alternative defence, that, while the defendant does not admit his liability for damages, he brings into Court \$150 and says that the same is sufficient, etc.

Held, affirming the order of KINGSMILL, local judge of Bruce, that the money paid into Court under this defence could not be retained there to answer the defendant's costs, if he succeeded, unless a proper case were made for ordering security for costs.

W. H. P. Clement, for the defendant.

Hoyles, for the plaintiff.

Boyd, C.]

[Oct. 26.]

SERVOS V. SERVOS.

Changing place of trial—Preponderance of convenience.

In an action by a husband against his wife to enforce a charge on land, the cause of action arose at Hamilton where also the parties and their respective solicitors and all the witnesses resided; but the plaintiff proposed that the action should be tried at Toronto. The increase in expenses of a trial at Toronto over one at Hamilton was estimated by the defendant at between \$50 and \$75, and by the plaintiff at about \$30.

Held, that there was an exceeding preponderance of convenience in favour of Hamilton, and it was ordered that the place of trial should be changed unless the plaintiff at once paid into the Court \$40 to meet the defendant's additional expense.

Shepley, for the defendant.

Holman, for the plaintiff.

LAW SOCIETY OF UPPER CANADA.

Law Society of Upper Canada.



OSGOODE HALL.

TRINITY TERM, 1885.

During this Term the following gentlemen were called to the Bar, viz.:—

George Morehead, Angus Claude Macdonell, John Jackson Scott, Angus MacMurchy, Leonard Hugh Patten, Spencer Love, James Baird, Philip Henry Simpson, Charles Julius Mickle, Louis Martin Hayes, Stephen Ormend Richards, Ed. William Murray Flock, David Fasken, Sandford Dennis Biggar, Geo. Hamilton Jarvis, John Alfred McAndrew, Archibald Gilchrist Campbell, Joseph Priestly Fisher, George H. Cory Thomson, Henry Thomas Shibley, Douglas Alexander, John Baldwin Hands, Stephen O'Brien, Ambrose Kenneth Goodman, Willoughby Staples Brewster, John Armstrong, John Shilton, John Strange, Henry Brock, Daniel Hugh Allan, Alexander George Murray, Francis Wolferstan Goodhue Thomas, John Frederick Grierson, Henry Walter Mickle, Francis Arthur Eddis, George Sandfield Macdonald, George Hiram Capron Brooke, Albert John Flint, Donald McDonald Howard, John Andrew Forin.

The following Graduates were admitted on 30th June, their admission to date as of Easter Term (18th May) under New Rule 29:—

Robert Maxwell Dennistoun, Heber James Hamilton, John Gumaer Holmes, Gordon Hunter, Matthew Ford Muir, John Irving Poole, William Wallbridge Vickers.

The following candidates were admitted as Students-at-Law, as of Trinity Term, 1885:—

Graduates—Clifford Kemp, Wm. Smith, A. E. K. Greer, E. J. McIntyre, A. D. Cartwright, J. H. Macnee, H. V. Lyon, S. A. Henderson, W. C. Chisholm, J. A. Collins, H. E. Irwin, E. H. Johnston, Jno. Kyles, R. O. McCullough, W. H. Walker, T. Walmsley, H. B. Witton, J. A. V. Preston, A. B. Thompson.

Matriculants—J. B. Holden, W. L. E. Marsh, F. W. Maclean, D. Holmes, A. J. J. Thibaudeau, *Juniors*—D. A. McKillop, S. H. Brooke, E. G. P. Pickup, Wm. Mackay, G. B. Carroll, W. J. Hanna, P. H. Bartlett, I. Greenizen, Wm. York, H. D. Macdonald, J. F. Keith, A. F. Wilson, J. Knowles, T. W. Scandrett, J. J. McPhillips, W. F. Smith, H. V. H. Cawthra, A. C. Boyce, O. E. Fleming, W. A. Smith.

SUBJECTS FOR EXAMINATIONS.

Articled Clerks.

- 1884 and 1885. { Arithmetic.
Euclid, Bb. I., II., and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-Keeping.

In 1884 and 1885, Articled Clerks will be examined in the portions of Ovid or Virgil, at their option, which are appointed for Students-at-Law in the same years.

Students-at-Law.

1884. { Cicero, Cato Major.
Virgil, Æneid, B. V., vv. 1-361.
Ovid, Fasti, B. I., vv. 1-300.
Xenophon, Anabasis, B. II.
Homer, Iliad, B. IV.
1885. { Xenophon, Anabasis, B. V.
Homer, Iliad, B. IV.
Cicero, Cato Major.
Virgil, Æneid, B. I., vv. 1-304.
Ovid, Fasti, B. I., vv. 1-300.

Paper on Latin Grammar, on which special stress will be laid.

Translation from English into Latin Prose.

MATHEMATICS.

Arithmetic; Algebra, to end of Quadratic Equations: Euclid, Bb, I., II. and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical Analysis of a Selected Poem:—

1884—Elegy in a Country Churchyard. The Traveller.

1885—Lady of the Lake, with special reference to Canto V. The Task, B. V.

HISTORY AND GEOGRAPHY.

English History from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography Greece, Italy and Asia Minor. Modern Geography. North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar,

Translation from English into French prose.

1884—Souvestre, Un Philosophe sous le toits.

1885—Emile de Bonnechose, Lazare Hoche.

LAW SOCIETY OF UPPER CANADA.

OF NATURAL PHILOSOPHY.

Books—Arnett's elements of Physics, and Somerville's Physical Geography.

First Intermediate.

Williams on Real Property, Leith's Edition; Smith's Manual of Common Law; Smith's Manual of Equity; Anson on Contracts; the Act respecting the Court of Chancery; the Canadian Statutes relating to Bills of Exchange and Promissory Notes; and cap. 117, Revised Statutes of Ontario and amending Acts.

Three scholarships can be competed for in connection with this intermediate.

Second Intermediate.

Leith's Blackstone, 2nd edition; Greenwood on Conveyancing, chaps. on Agreements, Sales, Purchases, Leases, Mortgages and Wills; Snell's Equity; Broom's Common Law; Williams on Personal Property; O'Sullivan's Manual of Government in Canada; the Ontario Judicature Act, Revised Statutes of Ontario, chaps. 95, 107, 136.

Three scholarships can be competed for in connection with this intermediate.

For Certificate of Fitness.

Taylor on Titles; Taylor's Equity Jurisprudence; Hawkins on Wills; Smith's Mercantile Law; Benjamin on Sales; Smith on Contracts; the Statute Law and Pleading and Practice of the Courts.

For Call.

Blackstone, vol. 1, containing the introduction and rights of Persons; Pollock on Contracts; Story's Equity Jurisprudence; Theobald on Wills; Harris' Principles of Criminal Law; Broom's Common Law, Books III. and IV.; Dart on Vendors and Purchasers; Best on Evidence; Byles on Bills, the Statute Law and Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of Intermediate Examinations. All other requisites for obtaining Certificates of Fitness and for Call are continued.

1. A graduate in the Faculty of Arts, in any university in Her Majesty's dominions empowered to grant such degrees, shall be entitled to admission on the books of the society as a Student-at-Law, upon conforming with clause four of this curriculum, and presenting (in person) to Convocation his diploma or proper certificate of his having received his degree, without further examination by the Society.

2. A student of any university in the Province of Ontario, who shall present (in person) a certificate of having passed, within four years of his application, an examination in the subjects prescribed in this curriculum for the Student-at-Law Examination, shall be entitled to admission on the books of the Society as a Student-at-Law, or passed as an Articled Clerk (as the case may be) on conforming with clause four of this curriculum, without any further examination by the Society.

3. Every other candidate for admission to the Society as a Student-at-Law, or to be passed as an Articled Clerk, must pass a satisfactory examination in the subjects and books prescribed for such examination, and conform with clause four of this curriculum.

4. Every candidate for admission as a Student-at-Law, or Articled Clerk, shall file with the secretary, six weeks before the term in which he intends to come up, a notice (on prescribed form), signed by a Bench, and pay \$1 fee; and, on or before the day of presentation or examination, file with the secretary a petition and a presentation signed by a Barrister (forms prescribed) and pay prescribed fee.

5. The Law Society Terms are as follows:

Hilary Term, first Monday in February, lasting two weeks.

Easter Term, third Monday in May, lasting three weeks.

Trinity Term, first Monday in September, lasting two weeks.

Michaelmas Term, third Monday in November, lasting three weeks.

6. The primary examinations for Students-at-Law and Articled Clerks will begin on the third Tuesday before Hilary, Easter, Trinity and Michaelmas Terms.

7. Graduates and matriculants of universities will present their diplomas and certificates on the third Thursday before each term at 11 a.m.

8. The First Intermediate examination will begin on the second Tuesday before each term at 9 a.m. Oral on the Wednesday at 2 p.m.

9. The Second Intermediate Examination will begin on the second Thursday before each Term at 9 a.m. Oral on the Friday at 2 p.m.

10. The Solicitors' examination will begin on the Tuesday next before each term at 9 a.m. Oral on the Thursday at 2:30 p.m.

11. The Barristers' examination will begin on the Wednesday next before each Term at 9 a.m. Oral on the Thursday at 2:30 p.m.

12. Articles and assignments must be filed with either the Registrar of the Queen's Bench or Common Pleas Divisions within three months from date of execution, otherwise term of service will date from date of filing.

13. Full term of five years, or, in the case of graduates of three years, under articles must be served before certificates of fitness can be granted.

14. Service under articles is effectual only after the Primary examination has been passed.

15. A Student-at-Law is required to pass the First Intermediate examination in his third year, and the Second Intermediate in his fourth year, unless a graduate, in which case the First shall be in his second year, and his Second in the first six

LAW SOCIETY OF UPPER CANADA.

months of his third year. One year must elapse between First and Second Intermediates. See further, R.S.O., ch. 140, sec. 6, sub-secs. 2 and 3.

16. In computation of time entitling Students or Articled Clerks to pass examinations to be called to the Bar or receive certificates of fitness, examinations passed before or during Term shall be construed as passed at the actual date of the examination, or as of the first day of Term, whichever shall be most favourable to the Student or Clerk, and all students entered on the books of the Society during any Term shall be deemed to have been so entered on the first day of the Term.

17. Candidates for call to the Bar must give notice, signed by a Benchor, during the preceding Term.

18. Candidates for call or certificate of fitness are required to file with the secretary their papers and pay their fees on or before the third Saturday before Term. Any candidate failing to do so will be required to put in a special petition, and pay an additional fee of \$2.

F E E S .

Notice Fees	\$1 00
Students' Admission Fee	50 00
Articled Clerk's Fees	40 00
Solicitor's Examination Fee	60 00
Barrister's " "	100 00
Intermediate Fee	1 00
Fee in special cases additional to the above	200 00
Fee for Petitions	2 00
Fee for Diplomas	2 00
Fee for Certificate of Admission	1 00
Fee for other Certificates	1 00

PRIMARY EXAMINATION CURRICULUM

For 1886, 1887, 1888, 1889 and 1890

Students-at-law.

CLASSICS.

1886.	Cicero, Cato Major.
	Virgil, Æneid, B. I., vv. 1-304.
	Cæsar, Bellum Britannicum.
	Xenophon, Anabasis, B. V.
	Homer, Iliad, B. VI.
1887.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
	Cæsar, Bellum Britannicum.
1888.	Xenophon, Anabasis, B. I.
	Homer, Iliad, B. IV.
	Cæsar, B. G. I. (vv. 1-33.)
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. I.
1889.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. IV.
	Cicero, In Catilinam, I.
	Virgil, Æneid, B. V.
	Cæsar, B. G. I. (vv. 1-33)
1890.	Xenophon, Anabasis, B. II.
	Homer, Iliad, B. VI.
	Cicero, In Catilinam, II.
	Virgil, Æneid, B. V.
	Cæsar, Bellum Britannicum.

Translation from English into Latin Prose, involving a knowledge of the first forty exercises in Bradley's Arnold's Composition, and re-translation of single passages.

Paper on Latin Grammar, on which special stress will be laid.

MATHEMATICS.

Arithmetic: Algebra, to the end of Quadratic Equations: Euclid, Bb. I., II., and III.

ENGLISH.

A Paper on English Grammar.

Composition.

Critical reading of a Selected Poem:—

1886—Coleridge, Ancient Mariner and Christabel.

1887—Thomson, The Seasons, Autumn and Winter.

1888—Cowper, the Task, Bb. III. and IV.

1889—Scott, Lay of the Last Minstrel.

1890—Byron, the Prisoner of Chillon; Childe Harold's Pilgrimage, from stanza 73 of Canto 2 to stanza 51 of Canto 3, inclusive.

HISTORY AND GEOGRAPHY.

English History, from William III. to George III. inclusive. Roman History, from the commencement of the Second Punic War to the death of Augustus. Greek History, from the Persian to the Peloponnesian Wars, both inclusive. Ancient Geography—Greece, Italy and Asia Minor. Modern Geography—North America and Europe.

Optional Subjects instead of Greek:—

FRENCH.

A paper on Grammar.

Translation from English into French Prose.

1886) Souvestre, Un Philosophe sous le toits.

1888) Lamartine, Christophe Colomb.

1890)

1887)

1889)

OR, NATURAL PHILOSOPHY.

Books—Arnot's Elements of Physics; or Peck's Ganot's Popular Physics, and Somerville's Physical Geography.

ARTICLED CLERKS.

Cicero, Cato Major; or, Virgil, Æneid, B. I., vv. 1-304, in the year 1886; and in the years 1887, 1888, 1889, 1890, the same portions of Cicero, or Virgil, at the option of the candidates, as noted above for Students-at-Law.

Arithmetic.

Euclid, Bb. I., II., and III.

English Grammar and Composition.

English History—Queen Anne to George III.

Modern Geography—North America and Europe.

Elements of Book-Keeping.

Copies of Rules can be obtained from Messrs. Rowsell & Hutchason.

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No. 20.

DIARY FOR NOVEMBER.

15. Sun.....24th Sunday after Trinity.
16. Mon.....Michaelmas Sittings, Ch. Div. H.C.J., begin.
Wilson, J., Q.B., and Gwynne, J., C.P., 1868.
17. Wed.....Hagarty, C.J., Q.B.; Wilson, J., C.P., 1878.
18. Thur.....Princess Royal born, 1840.
21. Sun.....25th Sunday after Trinity.
22. Wed.....Lord Lorne, Gov.-General of Canada, 1878.
27. Fri.....Cameron, J., Q.B., 1878.
29. Sun.....Advent Sunday.
30. Mon.....Moss, J., appointed C.J. of Appeal, 1877.

TORONTO, NOVEMBER 15, 1885.

OUR attention has been drawn to some observations in a public journal taking exception to the speech of Mr. Senator Gowan on the Franchise Bill, and charging us, anent our comment thereon, with violating the principles on which a law periodical is generally conducted. We may remark *en passant* that the political press on both sides is always very indignant when the legal press finds occasion, in the discharge of its duty to the profession, to say anything which may incidentally tread on any of their pet political corns. The fact that we are quoted approvingly, or the reverse, turn about, by both parties, is the best proof that as to party politics we editorially know nothing and care less.

As to the case in point it was stated in certain newspapers, and either said or insinuated in Parliament, that members of the Bar would be found ready tools, willing to place honour, conscience and manhood in the background, and lend themselves to the Chief Minister of the Crown to carry out alleged nefarious designs on his part. This was the effect of what was animadverted upon in the speech of "the Senator from Barrie"—a barrister, by the

way, of nearly fifty years standing, and one who for very many years graced the Bench of his country. In his place in Parliament he repudiated any such insinuations against the profession, and bore testimony to the honourable character of the Bar of his Province. What more natural and proper than that he should so speak, and that we, as an organ of the profession that was slandered, should reproduce his testimony? We see no inconsistency or violation of principles involved in upholding the honour of the profession. It would be a very inconsistent violation of our principles if we did not do so.

IN *Laird v. Briggs*, 19 Chy. D. 22, Fry, J., held that the word "reversioner" in the Imperial Prescription Act, 2 & 3 W. IV. c. 71, s. 8 (R. S. O. c. 108, s. 41), includes a "remainderman," and that consequently the latter, as well as a reversioner, is entitled to the additional period provided by that section within which to resist the claim of a person to an easement by prescription. This case was appealed and was disposed of on other grounds, all the Judges of Appeal, however, being careful to say that they did not desire to be understood as assenting to the construction Fry, J., had placed on the section above referred to. In the recent case of *Symons v. Leaker*, 53 L. T. N. S. 227, the point has come up again squarely for consideration. In that case (which was one for trespass) a right of way was claimed by the defendant over a certain field. This right had been exercised from 1828 to 1884, but during all this time the servient tenement had been in possession of a tenant for life, expectant on whose estate

CITING CASES.

the plaintiff had been entitled in remainder. On the plaintiff's estate falling into possession this action was brought within the time limited by section 8. A Divisional Court, composed of Field and Manisty, JJ., refused to follow the ruling of Fry, J., in *Laird v. Briggs*, and held that a remainderman is not a person entitled in reversion within the meaning of section 8, and consequently that the plaintiff was barred by the statute, and that the defendants had acquired an indefeasible right to the easement in question.

CITING CASES.

It is an easy matter to cite cases. It is not always an easy matter to cite them effectively. If we might be allowed to make a suggestion we should say that the most effective way to cite authorities is to abstain from citing any case which the citer has not himself read. Furthermore, we should say that to throw a mass of citations at a Court without regard to order, is not a good method. If counsel desire to have the cases he cites read and weighed by the Court, some discrimination is necessary in the selection of the cases to be cited. Generally speaking, when a late case is cited which collects and discusses previous authorities, it is useless and a waste of time to cite the earlier authorities which are so collected, unless counsel desire to make some point by so doing, as, for example, to induce the Court to reconsider the later case, or to distinguish it from the case in hand.

The great object of citing cases is to assist the Bench in coming to a right conclusion on the matter being argued; and, depend upon it, the judges very soon learn to appreciate at their proper value arguments marked by citations carefully and intelligently made, and those which are characterized by an undigested heap of

cases from text-books or digests flung at the Court promiscuously.

We have sometimes heard counsel who were by no means inexperienced juniors, citing cases to the Court by the initial letters or abbreviations by which the reports are known, *eg.*, "Drew." for "Drewry," and "D. M. & G." for "DeGex, McNaghten & Gordon." We need hardly say that counsel who thus cite cases inevitably create the impression that they have never looked at the case they thus cite.

We think no student will waste his time, if in his studentship he endeavours to make it a rule never to cite cases that he has not read; and to make it a rule never to cite cases merely for the purpose of multiplying authorities on the same point, unless there is some real reason for so doing. The advantage of this early training will soon be manifest when he enters into active practice on his own account. The gaining the ear and the confidence of the Court is what all counsel should aim at, and we know of no better means by which counsel may do this than by being known to the judges as one who never cites authorities unnecessarily, or which are not in point; and, above all, as one who never misstates the effect of a case that he does cite, or attempts to conceal any case from the attention of the Court which bears upon the case under consideration.

This brings us to another point, and that is how an advocate should cite cases adverse to the side for which he is arguing. Those who regard it to be the duty of the advocate to win his client's case by hook or by crook, honestly if he can, but any way to win it, will perhaps be inclined to think that an adverse decision should simply be ignored by him, unless brought to the attention of the Court by his opponent. We doubt very much, apart from any question of professional ethics, whether

RECENT ENGLISH DECISIONS.

this method really pays in the long run. A case may be overlooked by the opponent, but it may be discovered by the Court, and is considered and acted on very often without having been considered or discussed by counsel for the client to whose contention it is opposed. This, of itself, is a disadvantage; but there is the still greater disadvantage that the counsel who fail to bring all the material cases to the attention of the Court, leave the impression that their not doing so is due to a want of either industry, or perfect honesty. A friend who has perused what we have written, suggests that it would be well to add "that it must always be remembered that an advocate is not merely an advocate, but also *amicus curiæ*," a sentiment in which we concur.

RECENT ENGLISH DECISIONS.

LEGACY TO EXECUTOR—GIFT ANNEXED TO OFFICE.

Turning now to the cases in the Chancery Division, the first that calls for observation is *In re Appleton, Barber v. Tebbitt*, 29 Chy. D. 893, a decision of the Court of Appeal. The question in dispute was whether a legacy given to a legatee, who by a subsequent clause in the will was appointed executor, was annexed to the office, or whether the legatee could renounce the executorship, and at the same time claim the legacy. Chitty, J., the Judge of first instance, held the legacy was annexed to the office, and this opinion was confirmed by the appellate Court. The fact that there were other legacies of different amounts given to other persons, also named as executors, was held to make no difference, notwithstanding the contrary opinion expressed by James, V.C., in *Jarvis v. Lawrence*, 8 Eq. 345, 347.

BUILDING SOCIETY—BORROWING POWERS—ULTRA VIRES—MISTAKE OF LAW—SUBROGATION.

The case of *Blackburn v. Cunliffe*, 29 Chy. D. 902, is deserving of notice, notwithstanding that it turns to some extent on the effect of statutes of merely local operation. This action was brought by the liquidators of a building

society to recover moneys which had been paid by the society to the defendants in settlement of certain overdrafts in a banking account, kept by the society with the defendants. The society had no power to borrow money; but the defendants had from time to time allowed the society to make large overdrafts—and the directors signed a memorandum, giving the defendants a lien upon all the society's deeds to secure the floating balance due to the defendants. Annual balance sheets, showing the amounts due to the defendants, were sent to all the members of the society, and adopted at the annual meetings—and moneys were from time to time applied on account of the indebtedness. It was argued that the liquidators were estopped from recovering the moneys so applied on the ground that the moneys had been paid in mistake of law, and also on the ground of acquiescence by the members of the society. But the Court of Appeal, affirming the Vice-Chancellor of the County Palatine of Lancaster, held that neither ground afforded any defence to the action—but the Court varied the judgment appealed from, to the extent of allowing the defendants to stand in the position of parties whose claims had been paid out of the overdrafts, and also declared the defendants entitled to a lien on all mortgage securities taken by the society, in respect of loans made out of the moneys overdrawn from the defendants, in priority to any claim of the society for moneys advanced thereon, out of its own proper funds.

INFANT MAINTENANCE—DISCRETION OF TRUSTEES—JURISDICTION.

The Court of Appeal in *Re Lofthouse*, 29 Chy. D. 921, reversed an order of Bacon, V.C., made upon the application of an infant by her next friend for maintenance. The application was made on motion in a summary way. The will under which the infant was interested empowered the trustees for the time being to apply all, or any part of the yearly income of the share of the infant, in or towards the maintenance and education, or otherwise for the benefit, of the infant. The income amounted to £538 5s. 3d. The trustees opposed the application, claiming that the Court had no jurisdiction to interfere with this discretion. Bacon, V.C., however, made an order for an allowance of £400 a year. The trustees ap-

RECENT ENGLISH DECISIONS.

pealed to the Court of Appeal, which reversed the order of Bacon, V.C., as being made without jurisdiction. Cotton, L.J., says on this point :

"Such an order could not be made on such a summons as this, which was merely a summons in the matter of an infant. It is quite right for the Court on such a summons to appoint guardians, or to advise trustees what sums can properly be allowed for the maintenance of the infant, but the Court has no jurisdiction as against trustees, or as against any one else, on such a summons, except when there is a contempt of Court. This order was one that could only be made in a suit, constituted either by an originating summons, or by a writ, so as to make it an ordinary action."

The point as to whether the Court could, in any case, have interfered with the trustees' discretion exercised *bona fide*, however, was not determined. This case is also useful for the principles laid down by Cotton, L.J., for the guidance of trustees in making allowances for the maintenance of an infant, whose father is unable to maintain her suitably. He says :

"In exercising their discretion, they must consider what is most for the benefit of the infant. In considering that, they should take into account that the father is not of sufficient ability properly to maintain his child, and that it is for her benefit, not merely to allow him enough to pay her actual expenses, but to enable him to give her a better education and a better home. They must not be deterred from doing what is for her benefit, because it is also a benefit to the father, though, on the other hand, they must not act with a view to his benefit, apart from hers."

MORTMAIN—MONEY SECURED ON LANDS.

In *re Watts, Cornford v. Elliott*, 29 Chy. D. 947, the Court of Appeal was called on to determine how far, if at all, a bequest to charity made under the following circumstances could take effect : The testator was entitled to a mortgage debt of £800, which was secured by a mortgage upon the interest of the mortgagors in certain trust funds. At the date of the mortgage, and of the testator's death, part of these funds was invested on mortgage of real estate, and part was pure personalty. The testator bequeathed to charities such part of his residuary estate as could by law be so bequeathed. The mortgage was part of the residuary estate. Pearson, J., held that no part of the mortgage debt could go to the

charities, and this decision was affirmed by the Court of Appeal, and it was held that there could be no apportionment, so as to give the charity the benefit of a portion of the debt equivalent to that portion of the trust fund which consisted of pure personalty, because every part of the mortgage debt must be taken to be secured on the whole of the mortgaged property, and therefore charged on land.

MORTGAGE—SALE—MISAPPLICATION.

West London Commercial Bank v. Reliance Permanent Building Society, 29 Chy. D. 954, is a decision of the Court of Appeal, which is said by the Court to determine a nice point upon which no authority was to be found. The mortgagor, with the concurrence of the first mortgagees, who had notice of a second equitable mortgage sold the mortgaged property. Upon completion of the sale, the balance of the purchase money, after payment of the claim of the first mortgagees, was handed to the mortgagor. The question in the action was whether the first mortgagees were liable to the second mortgagees for this misapplication of the purchase money. Bacon, V.C., 27 Chy. D. 187, held that they were, and the Court of Appeal affirmed his decision. Cotton, L.J., says :

"It is conceded that if he exercises his power of sale as mortgagee, whether under the terms of the mortgage deed, or by statute, he is answerable for the money he receives if he pays it to the wrong person, that is to say, if he passes over the second mortgagee and pays it to the mortgagor, who has no right to receive it. Ought we then to make any distinction between such a case and the present? Here the first mortgagees, though they did not concur with the mortgagor in putting up the property for sale, did concur with him in the conveyance. Having done so with the knowledge that part of the purchase money was going to be applied in violation of a right of which they had notice, they are, in my opinion, just as liable as if they had received the whole of the money."

ADMINISTRATION—STATUTE OF LIMITATION—R. S. O. c. 61, s. 8.

In *re Johnson, Sly v. Blake*, 29 Chy. D. 964, Chitty, J., determined that the 23 & 24 Vict. c. 38, s. 13, which is similar in terms to R. S. O. c. 61, s. 8, is retrospective, so that the limitation of twenty years "next after a present right to receive the same shall have

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accrued" within which actions are to be brought to recover personal estate of any person dying intestate, possessed by the legal personal representative of such intestate, is not confined to cases in which the intestate died after the Act came into operation, but extends to cases where the intestate was dead prior to the Act; and for this reason the claim of next of kin for general administration of the estate of an intestate who died in 1848 was barred at the end of twenty years from that date; and leave to revive an administration suit relating to the same estate, in which no proceedings had been taken since he decease in 1855, was refused. But with respect to assets of the intestate not received by the administrator until 1870, more than twenty years after the intestate's death, but within twenty years before the issue of the writ, it was held that the claim of the next of kin to administration, limited to such assets, was not barred, it being held that there was no "present right to receive" on the part of the next of kin until the assets had been actually received by the administrator. It was, moreover, held that part payment by the administrator out of a particular asset which has so fallen in, will not revive the right to sue for a general administration which was, at the time of the payment, barred by the statute.

DOMICILE OF ORIGIN—UNSETTLED RESIDENCE.

In re Patience, Patience v. Main, 29 Chy. D. 976, is another decision of Chitty, J. The question in controversy was as to the domicile of an intestate who was born in Scotland in 1792 of Scotch parents. In 1810 he obtained a commission in the army and immediately proceeded with his regiment on foreign service, and served abroad till 1860 when he retired from the army. From that time until his death he resided in lodgings, hotels and boarding-houses in various places in England, dying in 1882 intestate, and a bachelor, in a private hotel in London, having no real estate in England and no property whatever in Scotland, and for the last twenty-one years of his life having never left the territorial limits of England. Under these circumstances it was held that the intestate's domicile of origin had not been lost, and that his domicile was consequently Scotch at the time of his death. Chitty, J., says, at p. 984:

"It appears that the intestate in this case was moving about England, and I think this shifting from place to place shows a fluctuating and unsettled mind; and that the fact of residence, although for twenty-two years, standing alone without any other circumstances to show the intention, is insufficient to warrant me in coming to the conclusion that he had intended to make England his home. . . . If there was an intention shown by any other acts on his part, such as the purchase of land, if he had a family bringing the family here, buying a grave, or any other circumstance, even a slight circumstance, then I should have been warranted in coming to a different conclusion."

EVIDENCE—BAPTISMAL REGISTER—ENTRY OF DATE OF BIRTH—DECLARATION OF DECEASED FATHER.

The next case, *In re Turner, Glenister v. Harding*, 29 Chy. D. 985, is also a decision of Chitty, J., and turns on a question of evidence—and discloses a somewhat curious state of facts. The action was brought for the administration of the estate of Lucretia Turner by two of her alleged next of kin, and it being suggested that the testatrix was illegitimate, and that the gift of the residue of her estate in trust for her next of kin was therefore void, an inquiry was directed as to her next of kin. The deceased testatrix and her sister Jane, it appears, were the daughters of Wm. Ireson and a Mrs. Fry, who were married on the 29th April, 1824—it also appeared that Jane and Lucretia were both baptized on the 9th March, 1825. The baptismal certificate of Jane contained this entry, "when born, November 19, 1815" and that of Lucretia, "when born, July 3rd, 1818." It was also proved that in 1839 the father entered into negotiations to purchase a farm in the name of his daughters, and among the papers of the solicitors who conducted the purchase was found a draft letter from a deceased member of the firm addressed to Wm. Ireson, dated 29th March, 1839, requesting to be informed "whether your daughters are now of age," and, among these papers was also found a letter purporting to come from Wm. Ireson, but which was proved to be in the handwriting of his daughter Jane, dated 2nd April, 1839, containing the following passage: "I have to inform you that my daughter Jane is twenty-four years of age on the 19th November next, and Lucretia is twenty-one years of age on 3rd July next," and it was proved that Jane was in the habit of writing letters for her father.

CARRIERS CONDITIONS AS TO PUNCTUALITY.

The lands in question were copyhold lands, and it was shown that the transaction was carried out in 1839, and that, according to the custom of the manor, infants were not admitted without at the same time the appointment of a guardian. On the other hand, it was proved that Lucretia was always acknowledged and treated in the family as the legitimate child of Wm. Ireson and his wife, and that it was never suggested that she was illegitimate; that Wm. Ireson described Jane and Lucretia in his will, as "my daughters," and that letters of administration to Mrs. Ireson's estate issued to Lucretia, who described herself, on applying for the grant, as one of the "natural and lawful children, and one of the next of kin" of Mrs. Ireson. The question, therefore, was how far the documentary evidence was admissible to rebut the evidence of reputation. The learned judge held both the letters and certificate were admissible, and though the statement as to the date of birth in the certificate, being one which the official duty of the rector did not require that he should make, was one to which not much weight should be attached if it stood alone, yet, in conjunction with the letters, the inference to be drawn from the documents was irresistible, and he determined therefore that Lucretia was illegitimate.

HUSBAND AND WIFE—CONVEYANCE BY WIFE—
SETTLEMENT.

The case of *Fowke v. Draycott*, 29 Chy. D. 996, demands a brief notice, inasmuch as North, J., therein decided that when a wife obtains an order under the Impl. Stat. 3 & 4 Will. IV. c. 74, s. 91, empowering her to convey her lands without her husband's concurrence, the order has not the effect of depriving the husband of his common law rights to the rents during the coverture. But the wife having separated from her husband on the ground of cruelty, and asserting her equity to a settlement, it was held that the husband was bound to provide for her out of the rents, and under the circumstances the whole of the rents were settled upon her.

RAILWAY—SALE OF SUPERFLUOUS LAND—PROHIBITION
AGAINST BUILDING.

The only case remaining to be noted is that of *Bird v. Eggleton*, 29 Chy. D. 1,012, a decision of Pearson, J. An Act of Parliament of 1806 provided that no buildings should at any time

thereafter be erected on a certain strip of land. In 1865 a railway company under their statutory powers acquired the land for the purposes of their undertaking. A part of the land thus acquired became superfluous land—and was sold by the company in 1868 to the defendant's landlord. The defendant in 1885 commenced to build on it, and the present action was brought by an adjoining proprietor to restrain him from so doing. The injunction was granted, the learned Judge holding that, as the railway company could only use the land for the purpose of their undertaking, that they could not themselves have built upon it, except so far as was necessary for the purposes of their railway, and that therefore when the land was sold as superfluous land, they could confer no greater power on the purchaser, but that the restriction imposed by the Act of 1806 bound the land in the hands of the latter.

SELECTIONS.

CARRIERS' CONDITIONS AS TO
PUNCTUALITY.

Wills, J., made what may seem a very trite remark in *M^cCartan v. North-Eastern Ry. Co.*, that, "when you have a contract to construe, the best thing to do is to see what it says before you begin to see what other people have said in other cases and under other circumstances and what construction has been put on other words." But this true and pithily put rule is commonly enough overlooked, and to that circumstance much of the confusion between cases relating to the construction of contracts may be traced. Especially is this so in reference to the cases on railway "conditions," and it was in reference to them that *M^cCartan's* case was decided.

Following the principle laid down by Wills, J., let us first see what was said by the contract there construed. The plaintiff, it should be premised, had taken four third-class tickets at the defendants' station at Durham by the 2.11 p.m. train for Belfast

CARRIERS CONDITIONS AS TO PUNCTUALITY.

via Leeds, Midland Railway, and Barrow, which was printed on the tickets, and it was further stated that they were "issued subject to regulations in time-tables." Now, on the outside of the defendants' time-table appeared the following, "Notice.—The hours or times stated in these tables are appointed as those at which it is intended, so far as circumstances will admit, the passenger-trains should arrive at and depart from the several stations; but their departure or arrival at the times stated, or the arrival of any trains passing over any portion of the company's lines in time for any nominally corresponding train on any other portion of their line, is not guaranteed; nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned, or any consequences arising therefrom. The issuing of tickets to passengers to places off this company's lines is an arrangement made for the greater convenience of the public; but the company will not be held responsible for the non-arrival of this company's own trains in time for any nominally corresponding train on the lines of other companies, nor for any delay, detention, or other loss or injury whatsoever which may arise therefrom, or off their lines." At the end of the time-bills there was a number of pages entitled "Connection with other Railways," and from one of those pages, headed "Through Communication between the North-Eastern Line and Ireland, Belfast via Leeds and Barrow," it appeared that the 2.11 p.m. train should arrive at Leeds at 4.45, and leave there at 5.10 by the Midland Company's line. Thus, there would have been twenty-five minutes spare time had the North-Eastern train been punctual; but instead of arriving at Leeds at the time stated, the train did not arrive till 5.22—thirty-seven minutes late. In consequence, the plaintiff missed the 5.10 p.m. Midland train, was unable to proceed to Belfast that night, and had to put up at a hotel at Leeds. The action was brought, accordingly, to recover the expenses to which he had been put; and the County Court Judge, holding that there was an implied contract that the defendants would use reasonable efforts to insure punctuality, and that the defendants had failed to show that the delay arose from no want of such reason-

able efforts, gave judgment in favour of the plaintiff.

From the report in the August number of the *Law Journal*, it appears that a special case was then stated by way of appeal on the part of the defendants, who contended that the words, "nor will the company, under any circumstances, be held responsible for delay or detention, however occasioned," as well as the other portions of the conditions, were amply sufficient to exempt the defendants from all liability. But, said *Meek*, for the plaintiff, the words "intended as far as circumstances will admit" clearly indicate an intention on the part of the company not to exclude themselves from all liability, the result of which exemption would be that they could start their trains as and when they liked. And no doubt if the words were apt for the purpose, the company might enjoy the advantage of such a condition: *Haigh v. Royal Mail Steam Packet Co.*, 52 L. J. Q. B. 640. Had they done so? was the question—the contract being collected from the ticket, the time tables and the conditions: *Le Blanche v. The London and North-Western Ry. Co.*, 1 C. P. D. 286. In other words, had they said, in effect, our trains will start and arrive as and when we like, and we shall be liable for nothing? "The hours or times stated in these tables are appointed as those at which it is intended," etc. "Intended" shows that was their intent, submitted *Meek*. Not so, held Huddleston, B.; they mean to say, "we intend to do so, if we can, but we do not intend to be bound by it"; or, as Wills, J., put it, "we intend, and we hope, and we mean, as far as circumstances will permit, to keep these times; but, mind you, we do not guarantee anything." But, may it not be said, the intention was "as far as circumstances will admit," which is in consistent with liberty reserved to start and arrive as and when the defendants chose, and the consequent exemption from all liability; and if so, should not the subsequent unlimited indulgence reserved to the company give way to the effect of the precedent clause? *Le Blanche v. The London and North-Western Ry. Co.*, *ubi supra*. But the Court felt unable to get over the effect of the subsequent terms, and strong enough they certainly were. We find them severally paraphrased by Huddleston, B.:—"We

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intend to run these trains according to these tables ; but we do not guarantee their departure or arrival." "We intend to do this but we will not guarantee the departure or arrival at the times mentioned, and under no circumstances will the company hold themselves responsible for delay or detention, however occasioned." "We give you tables, we state our intention that the train shall arrive in correspondence with the statement in the tables ; we will not guarantee it ; under no circumstances will we be responsible for delay or detention, however it may be occasioned ; and although it may happen upon any occasion that we do not arrive in time for the corresponding train, yet we will not be liable for that ; nor will we be responsible for the acts or defaults of other parties, nor for the correctness of the times over the lines of other companies." Well, if that was their intention those words would have more clearly indicated it ; but those were not the words.

Now, *Le Blanche's* case was properly pressed as showing that the company were bound to use all reasonable efforts to carry out their contract with the plaintiff. There the condition declared, in the first place, that "every attention shall be used to insure punctuality as far as practicable"; and it was held that, these words being inconsistent with the unlimited indulgence preserved to the company by the subsequent words, one part must give way, and the subsequent should give way to the first part. In one case the words are "it is intended," and in the other "shall be"; in one they are "as far as circumstances admit," and in the other "as far as practicable." The cases are distinguishable, said the Court ; and judgment was given for the defendants.—*Irish Law Times*.

THE NEIGHBOUR TO WHOM DUTY IS DUE.

"Who is one's neighbour?" is almost as important a question in the catechism of the law as "What is one's duty towards one's neighbour?" and the answer to it, although not so liberal as that of another catechism, is in the increase of the complicated relations of life becoming daily more sweeping. The definition of a pro-

prietary neighbour—the proprietor of the *alienum* of the legal maxim—presents no great difficulty, nor is it difficult to put the finger on the person to whom duties are owed in the familiar events of life, such as driving in the street. It is when the idea of contract is mixed up with the question of a liability independent of contract that the lawyer's difficulty arises. The liability of one party to a contract to the other presents no difficulty of this kind ; but of late years there have been before the Courts many cases raising the question whether a person under an undoubted contractual obligation to another is under a similar duty to all the world, or, if not, to what portion of the rest of his fellow-citizens. In other words, who is the neighbour to whom duty is due? The tendency of modern decisions has been gradually but largely to extend the area of the obligation in this direction. The case of *Elliott v. Hall*, 54 Law J. Rep. Q. B. 518, reported in the October number of the *Law Journal Reports*, is an example of the broader view recently taken by the judges in this matter in obedience to the impetus given by the decision of the Court of Appeal in *Heaven v. Pender*, 52 Law J. Rep. Q. B. 702, to the extension of the liability as tortfeasors of persons under no contractual liability to the person injured, but under such liability to some one else. In that case, it will be remembered, a workman in the employ of a painter who had contracted to paint a ship for her owner was held entitled to recover damages from the dock company for injuries caused by the staging on which he stood falling by reason of a defect in a rope provided by the company. In the Divisional Court judgment was given for the defendant ; but in the Court of Appeal the decision was reversed, the Master of the Rolls taking a very liberal view of the extent of the responsibilities of persons liable by contract or otherwise for negligence, and Lord Justice Cotton and Lord Justice Bowen preferring to treat the case as within the authority of *Indermaur v. Dames*, 36 Law J. Rep. C. P. 181. This was the "shaft" case, in which the defendant was held liable on the principle that he was bound to use care in the management of his premises in the interests of persons invited to come upon them. The variety of the facts in this

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class of cases makes it not easy to attach the circumstances of each to the name of the case, so that they may well have an explanatory addition to their respective titles. Thus, as *Langridge v. Levy*, 7 Law J. Rep. Exch. 387, has been called the "gun" case; *Winterbottom v. Wright*, 11 Law J. Rep. Exch. 415, the "coach" case; *George v. Skivington*, 39 Law J. Rep. Exch. 8, the "hair-wash" case; *Elliott v. Hall* may be called the "railway truck" case. In all these cases the plaintiff was successful, except the coachman who brought an action against the coach builder for injuries due to the breakdown of the wheel. Whether this case, which was so decided in consideration of the necessity of "drawing the line" to prevent an indefinite liability on the part of the maker of an article, will be upheld at the present day, may be open to doubt, and it is contrary to the tendency of the judicial opinion of the day.

In *Elliott v. Hall* the plaintiff, a workman in the employ of a coal company, had in the course of his duty to unload a truck of coals supplied by the defendant. The truck was hired by the defendant of the Midland Waggon Company, which undertook to do substantial repairs, leaving small matters to be repaired by the defendant. In the bottom of the truck was a trap-door kept in place by a pin, which was itself secured by a catch. The catch was lost, the pin was jerked out of place, and the plaintiff fell through the trap-door with the coals upon him. The jury negatived contributory negligence, and gave the plaintiff £200. In the argument of the case, *Heaven v. Pender* was relied upon as a conclusive authority. Mr. Justice Grove lays it down that "there was a clear duty on the defendant to supply an efficient truck, and the plaintiff was the servant of the person to whom the coals were supplied and the person whom the defendant might reasonably have supposed would unload the truck." This is the whole reason given by Mr. Justice Grove for his decision, except to comment on *Heaven v. Pender* in a way to show that the facts of it were not present to his mind. He says that the only question in that case was whether the dockmaster was liable to the plaintiff as well as the person who put up the staging, when in fact the dockmaster was the person who put up the staging. Mr. Justice Smith

is equally brief. He says "the plaintiff was not one of the public, not a bare licensee, not a stranger, but a person whose duty it was to unload the truck." So in *Winterbottom v. Wright* the plaintiff was not a stranger, but the coachman whose duty it was to drive the coach, and yet he was nonsuited. In regard to the contention on the part of the defendant that the duty is limited to occupiers of property, Mr. Justice Smith says, "In the case of *Foulks v. The Metropolitan Railway Company*, 44 Law J. Rep. C. P. 361, it was held that there was a duty to the plaintiff, although he had no ticket, since by providing the carriages the company held out an invitation to passengers to use them." But in that case the plaintiff had a ticket, and the Lords Justices were of opinion that a contractual relation existed between the plaintiff and the defendants, although, in the alternative, they considered that the "defendants had invited and received" the plaintiff so as to make them liable independently of contract.

Judgments so slenderly supported by reasoning from the previous decisions must have been based on the adoption of the broad principle laid down by the Master of the Rolls in *Heaven v. Pender*—namely that "wherever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct in regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill in regard to such danger." We have already (November 17, 1883) given reasons for not accepting this vague test, either as a sufficient rule or useful in itself or as reflecting the cases; and it was not concurred in by Lord Justice Cotton or Lord Justice Bowen, who decided the same case. It may very well be that the decision in *Elliott v. Hall* is right—the probabilities are that it is, because the circumstances of the case do not seem to carry the liability to an unreasonably wide extent—but at present we are sadly in want of a rule which will give us the legal test of the extent of liability in tort, while reconciling *Winterbottom v. Wright* or overruling it once for all, and with sufficient authority.—*Law Journal*.

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[Asst. Case.]

REPORTS.

ONTARIO.

ASSESSMENT CASE.

IN THE COUNTY COURT OF THE COUNTY OF LINCOLN.

TOWN OF NIAGARA V. DONALD MILLOY AND J. McMILLAN.

Assessment—Name of owner—Non-resident—Payment of taxes by note—Recovery in special manner—Principal and agent.

In an action brought by the Corporation of the town of N. to recover \$114.76 taxes against defendants as executors of the estate of D. M.,

Held, (1) that, the plaintiff's statement of claim not showing or alleging that the taxes could not be recovered in any of the special manners provided by the Assessment Act, the action could not be maintained.

Held, (2) that the legal effect of a note given by M. for taxes, and signed "J. M., agent for the M. estate," is that it is the personal note of M., and under the circumstances of this case it could not be treated as a payment of the taxes.

Held, (3) that real estate assessed to "M. estate" or "Estate of D. M." sufficiently designates the owner within the meaning of the Assessment Act, and that it was not necessary to give the names of the executors in whom the legal estate was vested.

Held, (4) that the defendants, who carried on business, but did not live in "N." were "residents" within the meaning of the Assessment Act, and that the land was properly assessed as "resident."

[St. Catharines, Oct. 10.—Senkler, Co. J.]

The action was commenced 18th Feb., 1882, and was brought to recover the amount of certain taxes appearing on the Assessment Roll for the Town of Niagara for the year 1879 as follows:—

East Ward.

No. 12. Isaac Addison (tenant), Milloy Estate (owner), Dock property.....	\$300 00
No. 13. Wm. H. Dobson (occupant), Milloy Estate (owner), Dock property	900 00
No. 16. Patrick Henney (occupant), Milloy Estate (owner), dock property	300 00
No. 17. Estate of D. Milloy (owner), old car buildings	4000 00
No 18. Estate of D. Milloy (owner), wharf.	4000 00

Western Ward.

No. 1. John Goodman (tenant), Milloy Estate (owner), Victoria St., No. 9... \$400 00

There was appended to each of the first five assessments a memorandum, "Notice dated 25th March, 1879," and to the last assessment, "Notice dated 24th March, 1879."

A by-law was passed by the Town Council of Niagara on 8th July, 1879, directing that certain rates should be raised for certain purposes amounting in all to eleven mills on the dollar on the assessed property in the town. A collectors roll was regularly prepared and given to the collector in which the several properties above mentioned, and the values and the amounts to be collected were shown.

It was admitted that the defendants were the executors of the late Duncan Milloy. They were in fact not only his executors but also the devisees and trustees of his real and personal estates under his will, and it was assumed for purposes of the argument that this was admitted. Neither of the defendants resided in Niagara, but both resided in Toronto.

Mr. Rogers, who was clerk of the Town of Niagara for 1879, and continued in that office until his death, died about a year ago.

It appeared from the evidence of John Murphy who was in the employ of defendant in 1879, and for some time before and after that year, looking after the wharf at Niagara for them, that on or about the 19th December, 1879, he had a conversation with Mr. Rogers, who told him he was short of money to make some payments. Murphy said he had no money, but would give his note if that was any use. Rogers said, very well, and Murphy accordingly gave Rogers a promissory note for \$117.10, dated 20th December, 1879, at three months, payable at the Quebec Bank, St. Catharines, to the order of John Rogers, Town Treasurer. This note was signed John Murphy, agent for the Milloy estate, and Rogers gave Milloy a receipt signed by William Curtis, collector for \$114.76. The receipt read as follows:—

\$109.30
\$5.46 p ct.

NIAGARA,
19th December, 1879.

\$114.17

Received of estate late D. Milloy, by J. Murphy, the sum of one hundred and fourteen dollars and seventy-six cents, being the amount of his taxes for the use of the Town of Niagara for the year 1879.

(Signed) WILLIAM CURTIS,

Collector.

It appeared from the evidence of Curtis, that he was not at Niagara on the day this note was taken

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and receipt given. When Curtis went from home, he was in the habit of leaving with Mr. Rogers his book of blank receipts with several receipts signed, and if any one paid his taxes to Rogers, he would fill up one of the receipts and give it to the person paying, and write the name, etc., on the stub.

Curtis said that Murphy had charge of the wharf, and that he served demands of payment on Murphy for the Milloy Estate; that he never mailed any notices, but delivered some to Murphy and some to defendant, McMillan. He did not specify any particular notices beyond demands of payment and did not specify any year in which he gave them. The note given by Murphy, no doubt, had the discount added in. It was discounted but not paid when due on 23rd March, 1880. New note for \$120 was given by Murphy, as agent for the Milloy Estate, at two months payable in the same way as the other. This was also discounted and protested for non-payment. It had not been paid, and was still held by the corporation.

In February, 1880, Murphy had a settlement with the Milloy Estate, on which he charged them with \$114.76, paid taxes and produced the receipts given him as a voucher, and they allowed him as for a cash payment.

Nicol Kingsmill, for the defendant, contended:

1. That the defendants were not assessed by name, and that an assessment to the Milloy Estate, or the Estate of D. Milloy, is in fact a void assessment.
2. That the defendants being non-residents of Niagara could only be assessed in respect of unoccupied property upon their written request to be so assessed, which request is not shown to have been ever made, and the principal property, *i.e.*, the car shops and wharf, are unoccupied.
3. That no proper notices of the assessment were given.
4. The proper modes of collecting the taxes were not shown to have been exhausted, and no action can be brought except when the taxes cannot be collected by the special modes given by the Act.
5. That the taxes were paid by Murphy's note.

Rykert, contra.

SENKLER, Co. J.—It is declared by section 6 of the Assessment Act that all land and personal property in the Province shall be liable to taxation subject to certain exceptions which do not affect the present case.

By section 14 land occupied by the owner shall be assessed in his name.

By section 15 land not occupied by the owner, but of which the owner is known, and at the time of assessment being made resides or has a local domicile or place of business in the municipality or

has given the notice mentioned in section 3, shall be assessed against such owner alone if the land is unoccupied, or against the owner and occupant if such occupant is any other person than the owner.

By section 16, if the owner of the land is not resident within the municipality, but resident within the Province, then if the land is occupied it should be assessed in the name of and against the occupant and owner; but if the land is not occupied and the owner has not requested to be assessed therefor, then it shall be assessed as land of a non-resident. Section 17 refers to the case of land owned by a person not resident within the Province.

By section 12 it is enacted that the assessor shall prepare an assessment roll, in which, after diligent enquiry, he shall set down according to the best information to be had

(1) The names and surnames in full, if the same can be ascertained, of all taxable persons resident in the municipality who have taxable property therein, and

(2) And of all non-resident owners who have given the notice in writing mentioned in section 3, and required their names to be entered on the roll.

It is evident that it was intended that the name in full of each owner who is assessed should appear on the assessment, if, after diligent enquiry, the same can be ascertained. The question is whether this direction is imperative or whether it is merely directory. I have not been referred to, nor have I been able to find, any decision in our own Courts on the subject.

In *Cooley on Taxation*, 278, note (i.) I find a reference to two American cases. Listing of land belonging to an estate to "widow and heirs" of the deceased person was held sufficient: *Wheeler v. Anthony*, 10 Wend. 346. A listing to "Estate of J. B. Coles" was held good: *State v. Jersey City*, 24 N. J. 108. Not having the American statute to refer to I cannot say how far these decisions are applicable. Considering the words of the sub-section 1 of section 12, the assessor is to put down the name and surname in full, if the same can be ascertained, of all taxable persons, etc. I cannot think it was intended that the names should be an absolutely essential part of the roll; the words seem to me to imply the possibility of the names not being obtained, and if so, it can hardly have been intended that the assessment should fail for want of the name. If the name can be dispensed with in any event is the Court to enter upon a consideration in each case of the degree of diligence that has been exerted in making inquiry about the same?

No doubt the cases are rare in which inquiry in the proper quarters would not discover the name, but an assessor's means of inquiry are limited. I

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do not know that he is called on to go out of his municipality to make inquiries, or to send to registry offices or surrogate courts miles away to search into deeds or wills: the words: "Estate of D. Milloy" or "Milloy Estate" are susceptible of explanation and proof of what they mean. They seem to have been used in the assessments at Niagara for several years, and the defendants themselves did not repudiate their own agent's act in recognizing the assessment and settling the amount. It is undoubtedly a most unsatisfactory mode of assessment, and one not to be encouraged, but I do not feel justified in holding it void.

As to the second objection, with respect to all the assessments except those of the "wharf" and "car shops," it appears that the several properties were occupied by tenants who are assessed for them, and it seems to me to follow under section 16 that the owners, if resident in the Province, must be assessed also.

With respect to the "wharf" and "car shops," if these properties were unoccupied, and if the defendant neither resided or had a legal domicile or place of business within the municipality, and had not given the notice mentioned in section 3, it is clear that these properties should be assessed as lands of non-residents. It appears to me, however, from the evidence of Murphy, that the wharf cannot be considered as unoccupied. A business was carried on there by the defendants through their agent Murphy; a personal occupation of the land is not necessary. I do not see how a property including a wharf at which boats stop daily, or at least frequently, and a warehouse in which goods are kept for remuneration, both under the control of an employé of the owner, can be treated as unoccupied, and I think it was properly assessed and should not have been assessed as non-resident land.

As to the "car shops" there is no evidence that they were occupied, but if the defendants who own them had a place of business in the municipality as they had at the wharf, I do not see why they should not be assessed for the property under section 15. There is an apparent conflict between sections 15 and 16; in the former the words are, "resident or have a legal domicile or place of business" in the municipality; in the latter they are, "is not resident within the municipality." Unless the word resident in the latter is construed to include "the having a place of business," I do not see how they can be reconciled, and I think it must be so construed in that section. A place of business seems to be preferred for purposes of assessment to a residence, see sections 31 and 32; and in these sections the terms are not used as representing the same thing, but are opposed to each other. In section

16 it seems to me to be different. I therefore think the "car shops" are properly assessed and should not have been assessed non-resident land.

As to the third objection, I think the memorandum of delivering the notice of assessment on the assessment roll sufficient evidence under section 41. As to the fourth objection, I am of opinion that it is not shown that the taxes could not be recovered in any special manner provided by the Assessment Act; and that for this reason the action cannot be maintained. It was on this ground that Mr. Justice Richards argued that the action could not be maintained in *Berlin v. Grange*, 5 C. P. 211; and his reasons seemed to be approved by Chief Justice Robinson in the Court of Appeal in same case: 1 E. & A., although the action was held not to be maintainable on other grounds also.

Mr. Justice Richards in that case, which was brought to recover taxes in arrears, after stating how non-resident owners of land should be assessed, gives his opinion (3rd) that having failed to recover the tax as to personal property of any person rated on the roll, for want of property to distrain, the amount of such tax may be recovered with interest as debt due to the municipality. (4th) As to taxes due on any lands that they cannot be sued for as a debt due to the municipality until after they have been five years in arrear, and on a sale of the lands the amount of the taxes cannot be recovered in that special manner provided by the Act. I have found no case in which this view of the law has been dissented from or reversed, and on this ground I am of opinion that the present action cannot be maintained, the plaintiffs not having attempted to collect the taxes by sale the lands assessed, which is one of the special modes pointed out by the Act for collecting the taxes. This practically disposes of the case, but as the question whether the claim of the town for those taxes had not been paid by the taking the note of Murphy for the amount was fully argued, I may give my opinion on this point.

Murphy was in the employ of defendants when he gave the note on the 19th or 20th Dec., 1879, to Rogers, the Town Clerk, who handed the receipt to him and entered in the collector's roll opposite each of the items, making up the amount for which he gave the receipt, the words "paid 20th Dec., 1879."

Murphy signed the note: "John Murphy, agent for the Milloy Estate," and the legal effect of this (the defendants contended) is that it is the personal note of Murphy and that he alone could be sued upon it, and they further contend that the plaintiffs having taken the note of a third person and given a receipt in full (treating the payment as cash), and

TOWN OF NIAGARA V. MILLOY ET AL.—RECENT ENGLISH DECISIONS.

having marked on the margin of the collector's roll that these items were paid on the day the note was given; that these facts show an intention on their part to take the note as payment and look to it alone, and that this view ought especially to be taken when it is borne in mind that the defendants have settled with Murphy on the faith of the receipts and allowed him in his accounts for the amount as if paid in cash, and that the effect of compelling them to pay in the present suit would be to make them pay twice.

The accounts produced did not show that the result last mentioned would follow at all. They do show that Murphy has entered the amount of the taxes as a payment made by him, and has endeavoured to reduce the amount of his indebtedness to the Milloy Estate by this amount; but after this reduction there remained a large indebtedness from him to the estate which he has not paid. The settlement, if any, was merely an adjustment of the account and was not followed by any payment on either side; if in consequence of Murphy's statement that he had paid these taxes the balance is not so large as it otherwise would be, that is a matter that could easily be made right when the falseness of Murphy's statement was discovered. Murphy's debt remains and it is a mere question of account. It is very different from the case of a settlement actually carried out and closed between a principal and agent in which some credit has, through the fault of a third party who has been dealing with the agent, been allowed the agent which he was not really entitled to; in such a case no doubt the principal would be protected from any claim on the part of the third party which would put him to loss, and the third party will be left to his remedy against the agent. In the present case it cannot be said that the defendants have been in any way prejudiced by what was done by Mr. Rogers. They have not altered their position in any way in consequence of it.

Then assuming that the legal effect of the note is that it is the note of Murphy, as I think at present is the case, what right had either the collector or the Town Clerk to take it? The collector's duty is to collect money: Cooley on Taxation 501, Harrison's Mun. Manual, 4th ed., 696, note (i.); *Spry v. McKenzie*, 18 U. C. R., 161, and he has no right to take anything else, and if he did the right to distrain would be interfered with: Harrison, 696, note (i.). The collector is a servant of the municipality performing a public duty, and his wrongful act cannot affect the public right.

I do not think the note was treated as payment of the tax.

For the reasons herein given then I am of

opinion that the plaintiffs must fail at present, and for the same reasons I think judgment must be given against them on the demurrer; the plaintiffs' statement of claim not showing or alleging that the taxes cannot be recovered by any special manner pointed out in the act.

I, therefore, give judgment for the defendants with costs; but I stay the entry of judgment until the ninth day of November next.

ENGLAND.

RECENT PRACTICE CASES.

FENDALL V. O'CONNELL.

Discovery—Husband and wife—Affidavit as to documents.

When an order for production of documents is obtained against a husband and wife who sue as co-plaintiffs, the affidavit as to documents must cover not only documents in their joint, but also those in their several possession.

[C. A.—29 Chy. D. 899.

COTTON, L.J.— . . . When a husband and wife are co-plaintiffs, the wife suing in respect of her separate estate, without a next friend, they ought to answer severally as to documents, for the wife may have in her actual possession documents relating to her separate estate. If so, she holds them as part of her separate estate, and she must answer as to them. They are in no sense in the custody of the husband and wife.

LINDLEY, L.J.— . . . Having regard to the present status of married women, an affidavit by husband and wife, confined to documents in their joint possession, would be in substance insufficient, for it would enable them to keep back documents of which they respectively had separate possession.

FRY, L.J. concurred.

Appeal from BACON, V.C., allowed.

IN RE CONEY, CONEY V. BENNETT.

Equitable execution—Defaulting trustee—Receiver.

Where a trustee has by the judgment of the Court been ordered to pay money, and is out of the jurisdiction, on default in payment a receiver may be appointed of his equitable interest in property within the jurisdiction.

[CHITTY, J.—29 Chy. D. 993.

CHITTY, J.— . . . I think that a receiver is, under the circumstances, the best remedy that can be found. I therefore make the order as asked. I have to add that the question has been already

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NOTES OF CANADIAN CASES.

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decided in *Stanger-Leathes v. Stanger-Leathes*. W. N., 1882, p. 71. The decision of Vice-Chancellor Bacon is in my opinion clearly law. I have gone to the trouble of delivering judgment in the present case because the Vice-Chancellor's decision, reported as it is in a mere note, has been doubted, but in my opinion without reason.

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
LAW SOCIETY.

COURT OF APPEAL.

[September 8.]

SCRIBNER V. KINLOCH ET AL.

Sale of goods—Vendor employed as clerk—Change of possession—Immediate delivery—R. S. O. ch. 119.

The judgment of the Queen's Bench Division (2 O. R. 265) was affirmed with costs, the judges in this Court being two for and two against the appeal.

McCarthy, Q.C., H. Cameron, Q.C., Dougall, Q.C., and McPhillips, for the appellants.

S. Smith, Q.C., J. K. Kerr, Q.C., and Holman, for the respondent.

[September 14.]

DOUGLAS V. HUTCHINSON.

Married woman—Dower—Separate estate—Fi. fa.

The defendant's first husband died in 1870, and she contracted a second marriage in 1871. This action was begun before the Married Women's Property Act, 1884, was passed.

Held (reversing the judgment of OSLER, J. A., 6 O. R. 581), that the defendant's right to unassigned dower in the lands of her first husband was not separate estate, but fell within the provisions of R. S. O. ch. 125, sec. 3, and was not liable to be sold under execution to satisfy the plaintiff's judgment.

Quare, per PATTERSON, J. A., whether a *fi. fa.*

is the appropriate remedy for reaching the separate property of a married woman.

W. H. P. Clement, for the appeal.

J. J. McLaren, contra.

[September 15.]

HENDRIE V. NEELON.

Contract for sale of timber—Non-delivery—Loss of profits—Measure of damages.

The judgment of the Queen's Bench Division (3 O. R. 603) was affirmed on appeal.

Edward Martin, Q.C., for the appeal.

McCarthy, Q.C., contra.

[September 15.]

BELL V. FRASER.

Creditor—Security—Account of balance—Loss by agent—Payment into Court—Defence—Condition—Liability—Satisfaction—Order XXVI. O. J. A.

The plaintiff, as assignee of an insolvent estate, claimed from the defendant, a creditor of the estate, an account as to his dealings with timber limits held by him as security, and payment of any balance. The timber was placed in the hands of K. & Co. for sale.

Held, upon the facts stated (affirming the decision of FERGUSON, J.), that the defendant was not liable for a loss occasioned by K. & Co.'s failure to pay over part of the price of the timber sold by him.

The defendant stated in his defence that in case the Court should be of opinion that the defendant was liable for payment of the balance, etc., the defendant brought into Court the sum of \$4,300, saying that the same was sufficient to pay in full all claims of the plaintiff in respect of the balance, etc., and paid into Court under this defence the said sum of \$4,300, which was withdrawn by the plaintiff after issue and before the trial.

FERGUSON, J., although he held that the plaintiff was not entitled to recover, refused to order him to refund the \$4,300.

The members of this Court being equally divided in opinion, an appeal from such refusal was dismissed with costs.

Per HAGARTY, C.J.O., and OSLER, J.A.—There was only one way in which this money

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Ct. Ap.]

could have been paid into Court, viz., under Order XXVI. O. J. A., unless under a special direction of the Court: the money was not paid in conditionally, but absolutely, in satisfaction of the plaintiff's claim, as an alternative defence, and therefore it was properly withdrawn by the plaintiff.

Per BURTON and PATTERSON, JJ.A.—The defence of payment into Court set up was not strictly pleadable, but was a notice to the plaintiff that the money was in Court to answer his demand if he established it. Money paid into Court under a defence is not inevitably to be regarded as paid in under Order XXVI. O. J. A. The inference that payment into Court is made for immediate satisfaction must yield to a direct notice that it is not made for that purpose; and such notice sufficiently appearing from the pleading, the money was improperly withdrawn by the plaintiff.

McCarthy, Q.C., for the appeal.

Gormully, contra.

[October 13.]

MOFFATT V. SCRATCH.

Disclaimer—Grant from Crown—Surrender—Tax sale—Surveyor-General's return.

The judgment of the Common-Pleas Division (8 O. R. 147) was affirmed, PATTERSON, J.A., dissenting.

J. H. Ferguson, for the appellant.

Falconbridge and *T. M. Morton*, for the respondent.

[October 13.]

HATELY ET AL. V. MERCHANTS' DESPATCH CO. ET AL.

Carrier—Bill of lading—Negligence—Liability—Condition.

The judgment of OSLER, J.A., at the trial (4 O. R. 723) was affirmed against the defendants (appellants), the Merchants' Despatch Co., with costs; but the judgment of the Queen's Bench Division (4 O. R. 723) as to the defendants, the Great Western S. S. Co., was reversed, and the action was dismissed as against these defendants. The question of the costs of the defendants, the Great Western R. W. Co., was reserved for further consideration.

Millar, for the defendants, the Merchants' Despatch Co.

Moss, Q.C., and *Aylesworth*, for the plaintiff.

Osler, Q.C., for the defendants, the Great Western S. S. Co.

W. Cassels, Q.C., and *Holman*, for the defendants, the Great Western R. W. Co.

[October 13.]

WHITING V. HOVEY.

Interpleader Issue—Judgment at trial—Appeal.

A motion to quash an appeal to this Court from the judgment of FERGUSON, J., at the trial of an interpleader issue (9 O. R. 314), upon the ground that the decision was merely interlocutory and not appealable, was dismissed without costs, the members of the Court being divided in opinion.

Robinson, Q.C., and *W. M. Hall*, for the respondent.

McMichael, Q.C., for the appellant.

[October 13.]

BEATTY ET AL. V. NEELON ET AL.

Misrepresentation—Action of deceit—Parties.

Held, reversing the judgment of WILSON, C.J., 9 O. R. 385, upon the facts stated in the former report, that the unsatisfactory nature of the evidence, the long delay, the conduct of the parties, and their dealings with the matters in dispute, disentitled the plaintiffs to relief.

Per HAGARTY, C.J.O.—The damage claimed was not for inducing the plaintiff to enter into a partnership or company, but for the injury sustained in the company by the misrepresentations of the defendants, a damage resulting to all the shareholders, and therefore the action should have been by the company.

Per BURTON, J.A., this was a common law action for deceit, and, if maintainable at all, was maintainable only by the plaintiffs to whom the alleged misrepresentations were made.

Robinson, Q.C., *Cassels*, Q.C., and *R. Gregory Cox*, for the appellants.

McCarthy, Q.C., and *J. H. Macdonald*, for the respondents.

Ct. Ap.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

[October 13.]

PORTEOUS v. MYERS.

Creditors' Relief Act, 1880—Distribution—Costs of first execution.

Held, affirming the judgment of the County Court of Perth, that the creditor, under whose execution an amount sought to be distributed under the Creditors' Relief Act, 1880, was levied, was not entitled to priority of payment of the costs of his action.

Moss, Q.C., for the appellant.

J. P. Woods, for the respondents.

[October 13.]

KENNEY v. MCKENZIE.

Party wall—Agreement to pay for—Right under covenant.

C. and the defendant were owners of adjacent lots, and C. being about to build on his lot agreed to erect a party-wall on the dividing line, and equally on both lots, defendant agreeing to pay for the half of the front forty feet thereof when erected, and for the rear portion whenever defendant should require to use it. Subsequently C. sold and conveyed his lot to the plaintiffs in fee by deed containing the usual statutory covenants. Some years later defendant erected a building on his lot, making use of the rear part of such party-wall, by reason of which he became liable to pay \$98.65 and interest therefor, and did accordingly pay the same to C. In an action by the plaintiffs, as assignees of C.'s interest in the said land, against defendant to recover the sum so due in respect of such wall,

Held, the payment by defendant to C. was proper, and that plaintiffs were not entitled as vendees of C. to insist on payment, the right to payment of the sum stipulated to be paid for the wall not having passed by the conveyance by C. to the plaintiffs.

Aylesworth, for appellant.

Lash, Q.C., for respondent.

CHANCERY DIVISION.

Boyd, C.]

[October 28.]

RE HONSBERGER, HONSBERGER v. KRATZ.

Interest against executors—Gradation according to conduct—English rule—Canadian rule—Costs—Allowance on money received, pendente lite.

The rules developed by the English cases regulating the award of interest against executors and rustees appear to be as follows:—(1) When money is kept in the executors' hands without sufficient excuse the offence is deemed an act of negligence and the usual court rate will be charged at 4 per cent.; (2) when the executors are not only negligent but commit an act of misfeasance by expending the funds for their own benefit, or in any other way use them, the higher rate of 5 per cent. will be charged; (3) If the act of misfeasance is of such a character as to lead to the conclusion that more than this rate of interest had been made out of the money, as for instance, if it is employed in ordinary trade or in speculation, the beneficiary will be allowed the option of either having an account of the profits or having the interest taken with rests. This gradation may be approximated here, (1) By charging an executor who negligently retains funds which he should have paid over or made productive for the estate at the statutory rate of 6 per cent.; (2) By charging him who has broken his trust by using the money for his own purposes (though not in trade or speculation) at such a rate of interest as is the then current value of money; and (3) By charging him who makes gain out of his trust by embarking the money in speculation or trading adventures with the profits or with compound interest as the case may be.

The executors in this case kept considerable and constantly increasing balances in their hands from year to year, and allowed the acting executor to use the money as he pleased. It was not proved that any profit was made out of it, and no special evidence was given to show what the current rate of interest during that period was; but that the notes and mortgages held by the executors bore interest for the most part at 6 per cent. On an appeal from the report of the Master it w

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NOTES OF CANADIAN CASES.

[Prac.]

Held, that the interest should be charged at 6 per cent. yearly, and that the awarding of compound interest is opposed to the spirit of the decision in *Inglis v. Beaty*, 2 A. R. 453, and could only be upheld as being in the nature of a penalty imposed on the executors.

The executors should get costs because the action was not occasioned by their misconduct; but they should not get the costs of such part of the enquiry as was caused by the misapplication of the funds or their failure to make reasonably accurate entries of their dealings with the estate.

The taking of administration proceedings does not deprive them of their functions as executors or even suspend them, and a reasonable allowance should be made for moneys received *pendente lite*.

Hoyles and Ingersoll, for the plaintiff.

Clement and Collier, for the defendants, the executors.

McClive, for the widow.

Boyd, C.]

[October 21.]

SNARR V. BADENACH.

Annuity—Interest on—As against assignee in insolvency of covenantor to pay annuity—Repairs—Covenant to keep houses suitable for tenants.

J. S. by his will gave his wife, E. S., an annuity of \$2,000 a year, and charged it on his estate. After his death, E. S., the annuitant, C. E. S. and M. A. S., two daughters, and W. A. S. and G. E. S., two sons, entered into an agreement whereby the annuity was charged on certain real estate and other property, and the sons covenanted to pay it, and the executors of J. S. transferred all their interest as executors in all the estate of J. S. to the said sons, subject to the said charge. W. A. S. and G. E. S. afterwards became insolvent, and B. became assignee in insolvency. The annuity fell into arrear for several years, and E. S. died, having made a will by which she devised all her estate to C. E. S. and M. A. S., the two daughters. C. E. S. and M. A. S. brought an action against B. to have a lien declared on the property for the amount of the arrears of the annuity, which was referred to the Master, who found that they had the right to maintain the action, and settled the amount of the annuity due at \$8,993.95, on which he allowed

interest for the six years preceding action brought at \$1,738.05. On an appeal from the Master's report, it was

Held, that R. S. O. c. 50, ss. 266 and 267, under which the interest was allowed, is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate and following *Booth v. Coulton*, 2 Giff. 520, except under extraordinary circumstances upon particular grounds suggested of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity, and in this case no interest should be allowed as against the estate and other creditors. Even if the statute justified the giving of interest as between the parties to the contract the awarding of interest could not be upheld as against the assignee in insolvency—the general rule being that interest ceases at the date of the assignment upon all debts where interest is not made part of the contract, unless it is evident that there is a surplus to be returned to the debtor.

Held, also, that the expense of some flooring, lathing and plastering was properly charged against the defendant, as the sons W. A. S. and G. E. S. had covenanted to keep the house reasonably and sufficiently tenantable and suitable for the occupation of tenants taking the same, and these repairs were made because the tenant threatened to leave.

Held, also, on the evidence in this case, that the Master was right in disallowing a large set-off brought in by the defendant over and above the sum of \$16,000 allowed for reconstructing the buildings.

W. A. Reeve and G. F. Ruttan, for the appeal.

J. C. Hamilton and Allan Cassels, contra.

PRACTICE.

Mr. Dalton, Q.C.]

[Nov. 10.]

WALMSLEY V. GRIFFITH ET AL.

Security for costs—Co-defendant—Counter-claim.

A defendant asking relief against his co-defendant will not be ordered to give security for costs.

Semble, such relief should not be asked by way of counter-claim.

J. R. Roaf, for defendant Webster.

Echlin, for defendant Hall.

CORRESPONDENCE.

The Court under said section 3 did make a general order (No. 196); but in their wisdom they made eleven exceptions to the jurisdiction of the referee instead of four. For example, the judges withheld "*ex parte* injunctions" from the referee, also "opposed applications for administration orders."

Not content with this the Legislature in 1885 has withdrawn the safeguard of a general order of the Court, and now the Queen's Bench Act, section 54, enacts directly that "the referee in chambers may do any such thing," etc., the rest, as in section 3 of the Act of 1881, with only the same four exceptions. Accordingly, the referee can entertain, and does entertain, motions for *ex parte* injunctions, and exercises many other judicial functions. If this legislation is *intra vires*, what is there to prevent the Local Legislature from transferring other judicial powers to the same officer—such as granting writs of *habeas corpus* or writs of arrest, hearing cases in the first instance, motions to continue injunctions, hearing *pro confesso*, and a score of other matters no whit more important than some of those now entrusted to him? As master he now has to adjudicate from time to time on matters of the highest importance, and in many cases the chief contest on the law and the facts takes place in his office. Questions of pedigree, legitimacy, heirship, fraud, title to land, rights of lien, and a hundred other questions of fact or law, involving the very pith and marrow of the suit, no matter what the amount at stake, are constantly referred to the master. Upon his report the judge bases his formal decree or order. These adjudications, whether in chambers or in the master's office, are final, unless appealed from. The time for appealing is strictly limited, and the mode of appealing prescribed must be carefully followed or the litigant is concluded.

The same authority which assumed to confer this jurisdiction upon these officers and provided for such appeals, could equally provide that there should be no appeal. Similarly, if the legislation in question is *intra vires*, provision might be made for the appointment of an officer to exercise all the powers now exercised by the judges in common law chambers, to take trials of causes, to take accounts and references between parties, etc., etc., and to relieve the judges of a great proportion of the work now done by them, and it would be all right if only the officer so appointed be not styled a *judge*. These considerations give rise to a grave doubt whether the Acts of the Local Legislature referred to are not *ultra vires* and void, and whether every judicial act performed by those officers is not without jurisdiction, and therefore unwarranted. Even in Ontario it may be questioned

whether it is competent to confer any new judicial powers upon the referee or master in any of the Courts as has been done by the Judicature Act and Orders; because if that could be done, where must the line be drawn, and what judicial powers cannot be legally conferred upon them?

There is another Manitoba statute which seems to me unconstitutional for a similar reason. I refer to the statute of 1883, known as the Master and Servant Act, which, as amended in 1885, assumes to confer jurisdiction upon a police magistrate or justice of the peace appointed by the Local Government to adjudicate upon any claims for wages up to the limit of one hundred dollars, and that too in a summary manner, and by proceedings of a *quasi*-criminal character. This jurisdiction is not taken away from the County Courts. Of course the Legislature can constitute any new Courts it pleases, either to try civil or criminal matters; but the point I make is that the person who presides in the Court which entertains such a matter as a claim for wages is really a judge, and must be appointed by the Governor-General before he can adjudicate at all in such a matter. In fact it is a serious question whether, in any of the cases referred to, the local legislation would be any protection to a master or a magistrate who should be sued for damages for any act done by him under colour thereof.

In anything I have here said, of course, no word of disparagement is intended for any of the officers personally, it is only the legislation that is criticised. Several decisions have been given holding that the Provincial authorities have the right of legislating with respect to the appointment of police magistrates and justices of the peace; but, so far as I am aware, the questions raised in this paper have not yet come up for judicial consideration.

Yours, etc., GEORGE PATTERSON.

Winnipeg, Oct., 1885.

PAPER TITLES.

To the Editor of the LAW JOURNAL:

DEAR SIR,—It is very provoking in dealing with titles to come across so many title deeds, abstracts and probates of wills written on this wretched straw paper. The profession ought to boycott any stationers dealing in such trash. The saving effected by purchasing these forms is so very infinitesimal that surely no practitioner or even unlicensed conveyancer would consider the price for a moment, compared with the satisfaction of

CORRESPONDENCE—FLOTSAM AND JETSAM.

handling good material. I have had probates of wills written on this wretched stuff that were in pieces one year after issued.

This is all the more provoking to the profession as we put wills into the Surrogate Court on good paper and in return get probates miserably written and on miserable paper. Our ancestors believed in parchment, but surely we have gone to the other extreme with a vengeance. I am just handling a deed made in July last which is in pieces.

Yours, etc.,

November, 1885.

SOLICITOR.

UNLICENSED CONVEYANCERS.

To the Editor of the LAW JOURNAL:

DEAR SIR,—Below is a true copy of an instrument filed in the office of the clerk of the County Court here, as a chattel mortgage, prepared by an unlicensed conveyancer in our county. I think the instrument would look well in print:—

"THIS INDENTURE, made this first day of October, one thousand eight hundred and eighty-five,

BETWEEN of the Township of Bayham, County of Elgin, Province of Ontario, of the first part; and of the Township of Bayham, County of Elgin, and Province of Ontario, of the second part,

WITNESSETH, that the said party of the first part, in consideration of the sum of \$13.51, to him duly paid, hath sold and by these presents, doth grant and convey to the said party of the second part the following described goods, chattels and property, namely: A black mare with one white hind foot, being the only horse

Now in the possession of the said party of the first part, together with all estate, title and interest, of the said party of the first part therein.

This grant is intended as a security for the payment of \$13.51, on or before the expiration of three months, from the date hereof, which payment, if duly made, will render this conveyance void.

In witness thereof, the said party of the first part, hath hereunto set his hand and seal, the day and year above written.

SEALED, SIGNED AND DELIVERED
in presence of, etc.

Seal.
sd.

There were no affidavits filed with this document.

Yours, etc., J. M.

[There is a silver lining to most clouds. That which a parsimonious layman gains by cheap conveyancing, he generally loses, with much more in addition, in expensive litigation. We trust this is the case in reference to the above amazing effort of genius.—Ed., L.J.]

FLOTSAM AND JETSAM.

VICE-CHANCELLOR BACON, one of the most incisive, but not most youthful, of the English judges, after listening, the other day, to three foreigners giving an immense mass of irrelevant and unintelligible evidence, exclaimed, in Mistress Quickly's words, "Here is an old abusing of God's patience and the King's English."—*Irish L. T.*

REPRESENTATIVE REED, of Maine, thus describes his admission to the Bar in California, adding that no one was ever admitted to the Bar with so simple an examination: "When I went up for examination the great question of the hour was the Legal-tender Act. Everybody was discussing its constitutionality. Some said it was constitutional, others said it was unconstitutional. The first question Judge Wallace asked me was, 'Is the Legal-tender Act constitutional or unconstitutional?' I didn't hesitate a moment. I said simply, 'It is constitutional.' 'You can pass,' said Judge Wallace. 'We always pass a man who can settle great constitutional questions off-hand.'"—*San Francisco Chronicle.*

THE JUDGE HAD BEEN THERE.—A laughable passage-at-arms occurred between Judge Armour and Mr. Garrow recently at an assize in Western Ontario.

On the question of the brevity of some legal documents, Mr. Garrow said that the modern practice was to cut them as short as possible.

"I don't know about that," said His Lordship, "I think it is the practice for lawyers to make them long so as to get as many folios as possible."

The law clerks present winked at each other, and grinned and chuckled.

Mr. Garrow (with dignity)—"My Lord, I don't think that it is fair to say that of the profession."

Justice Armour—"Well, I am speaking from my own experience!"—*Goderich Signal.*

THE addition to the House of Lords of four legal members at one time, is doubtless unprecedented in English history. Sir Hardinge Giffard, the Lord Chancellor, has already taken his seat as Lord Halsbury, and will soon be followed by Mr. Gibson, henceforth to be known as Lord Ashbourne.

FLOTSAM AND JETSAM.

With them will appear Sir Robert P. Collier, who has earned his distinction by fourteen years' service as a paid member of the Judicial Committee of the Privy Council, and Sir Arthur Hobhouse, who has been an unpaid member of the same distinguished body for four years only. Not one of the new law peers is at all likely to fill the place left vacant by Earl Cairns, but all of them give promise of useful service in the Supreme Appellate Court of the United Kingdom, so far as their other duties may allow them to attend its sittings.—*Law Times*.

DRUNKENNESS ON WHEELS.—The justices of Hastings appear to have a keen appreciation of the subtleties of the law. Last week a man in a state of intoxication was found being wheeled about in a bath chair, and brought before the bench for adjudication. But, said the justices, he was not found drunk in the street, as the Act requires. The bath chair was in the street, and he was in the bath chair, but he was not in the street. This very pretty distinction would carry the severe logician far. A man in a pair of top boots is not in the street, wherever his boots are, and it would go hard if anyone should be convicted of drunkenness unless he went barefoot. Still no one, looking at the man's discretion in exchanging legs little to be relied on for the smooth rolling wheels of a bath chair, and at so pleasing a display of magisterial acuteness, will grieve at the escape.—*Law Journal* (London).

MR. ARTHUR'S quiet return to his law practice from the great office of President of the United States startles the *Liverpool Post*, and it remarks that such a spectacle can be afforded by no country on earth but the United States. Old World potentates are expected to feather their nests well in their days of power, and the idea prevails there that every man holding a high office is entitled to retire rich or in the enjoyment of great pensions. And this robbery of the people is permitted not only for the benefit of those who have served the State, but for those whose ancestors happened to be royal favourites or mistresses. Such ideas are gradually gaining a foothold in this country, as is manifest from the clamour for a civil pension list for ex-Presidents. The spectacle of an ex-President going to work for his living is needed once in a while to assure us that public office is still a public trust, and that we still have men who can hold the Chief Magistracy and retire with clean hands.—*Ex*.

A REMARKABLE WILL.—"8th January, 1882. This is my will and testament. At the present moment I consider myself bodily healthy, but cannot swear that I am so in mind. Such ridiculous presumption I bequeath to others. My fortune amounts to 70,000 francs. How many hypocritical tears might I have purchased for such a sum? I intended at first to devote these 70,000 francs to a beneficent object; but I asked myself what would be the use of this? The only benefactors of mankind are war and cholera. Besides this, I am under great obligations to my dear wife, Celestine Melaine, of whose whereabouts I have not the slightest idea. She once did me a great kindness. She left me one beautiful morning and I have never heard of her since then. With the most heartfelt thankfulness I appoint her my heir-at-law but subject to the following condition, that she marry again immediately, so that at least there may be one man who will deeply deplore my death?"

"OBITER DICTA."—The Master of the Rolls (Rt. Hon. Sir Wm. Baliol Brett), whose elevation to the House of Lords received the hearty approbation of the legal profession, takes the title of Lord Esher, from the well-known village in Surrey, in which he formerly lived, and where his brother, Major Sir Wilford Brett, K.C.M.G., lives. His predecessors in office who have been made peers are not numerous. They are Lords Romilly, Langdale, Gifford, Colepeper and Kinloss. The last-named, who lies in the Rolls Chapel under his effigy in his robes of office, was Edward Bruce, a Scotch lawyer, who came to England with King James. Lord Colepeper was Master of the Rolls in days when law gave way to arms, and earned his title by his services in the field to King Charles I. The rest of the peers named were, like the new peer, distinguished lawyers. The eldest son of the Master of the Rolls is Mr. Reginald Brett, M.P. for Penrhyn and Falmouth, and private secretary to the Marquis of Hartington. The creation not only bestows a well-earned distinction, but secures to the public in the future the services in the highest Court in the country of one of its ablest lawyers.—*Ex*.

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DIARY FOR DECEMBER.

18. Fri.....First Lower Canadian Parliament met, 1792.
20. Sun.....4th Sunday in Advent.
23. Wed.....Christmas vacation, H. C. J., begins.
25. Fri.....Christmas Day.
26. Sat.....Upper Canada made a Province, 1791.
27. Sun.....1st Sunday after Christmas. Spragge, V.C., Chancellor, 1879.
31. Thur.....Revised Statutes of Ontario came into force, 1877.

TORONTO, DECEMBER 31, 1885.

We publish, as usual with this number, the Index of Subjects, Table of Cases, etc., for the past year. The Sheet Almanac for 1886 will come out in the beginning of the new year.

We did not refer at the time to the appointment of Mr. Edward Morgan to the junior judgeship of the County of York, inasmuch, as practising in a small country place, it was difficult to speak with any certainty as to his qualification for the position. Now, however, that there has been a better opportunity of forming an opinion, it is a pleasure to know, as well as a pleasant duty to record, that so far as his short term of duty has as yet extended, Mr. Morgan has given much satisfaction to the profession, and to those of the public who have appeared before him as litigants. Of Judge McDougall, his senior, we need only say that the high opinion we expressed, as to his judicial capacity when he was first appointed, is amply confirmed by experience.

MR. JUSTICE MORRISON.

THE death of one so well-known for many years was not an unexpected event. The whole profession will, nevertheless, mourn the loss of one with whom there always existed the most pleasant relations, and his many warm personal friends will be sad at losing one so much liked for his cheery nature and genial hospitality.

Mr. Morrison was born in Ireland on the 20th August, 1816, and came to this country in 1832 with his brother Angus and the rest of the family. In 1839 Joseph Curran Morrison, the deceased judge, was called to the Bar, and became an active member in the then well-known firm of Blake, Connor & Morrison. In 1848 he entered Parliament as a Liberal, but subsequently joined the Conservative ranks, and was for about seven years a member of Sir John Macdonald's Government as Solicitor-General. For a short time he was Registrar of the city of Toronto, but on 19th March, 1862, was raised to the Bench, taking the place of Mr. Justice Hagarty in the Court of Common Pleas, the Hon. James Patton becoming Solicitor-General. Mr. Justice Morrison was subsequently, in December, 1877, moved to the Court of Queen's Bench, in which he remained until made one of the judges of the Court of Appeal, in the room of Thomas Moss, who became chief of that Court. This position Mr. Morrison held until his death.

As a judge, though it cannot be said that Mr. Justice Morrison was a lawyer of the depth of learning, or of the intellectual calibre or power of expression of some of his associates, he had an intuitive perception of the rights of a case, strong com-

WHAT IS A MANUFACTURER?

mon sense, a good knowledge of human nature and an intimacy with business affairs and commercial matters, which made him a very valuable addition to the Bench; and, whether or not his reasons for his judgment were always sound, he was singularly correct in the result. As a *nisi prius* judge he was admirable.

With commercial law the late judge was exceedingly familiar, and in any reference of his judicial career this cannot be overlooked. An illustration of this knowledge and of his sound common sense will be found in the important case of *Cross v. Currie*, 5 A. R. 31, in which he saved the Court of Appeal from committing itself to the extraordinary result it had almost arrived at, as may be seen by the opinion of the other members of the Court.

For some time past Mr. Morrison, though he struggled cheerfully and bravely to perform his judicial duties, had been compelled to give up work, and the remorseless hand of death has prevented a resignation which failing health would soon have rendered necessary.

SELECTIONS.

WHAT IS A MANUFACTURER.

AN interesting case of definition is *Evening Journal Association v. State Board of Assessors*, 47 N. J. Law, 36, holding that a company printing and publishing a newspaper is not a "manufacturer," but one doing the business of job printing, engraving, electrotyping, etc., is a "manufacturer." The Court said: "Lexicographers define 'manufacture' to be 'the process of making any thing by art, or reducing materials into a form fit for use, by the hand or by machinery.' Worcester's Dict., tit. 'manufacture.' Mr. Brande defines 'manufacture' as a term employed

to designate the changes or modifications made by art or industry in the form or substance of material articles, in the view of rendering them capable of satisfying some want or desire of man; and manufacturing industry to consist in the application of art, science or labour to bring about certain changes or modifications of already existing materials. He includes under the term 'manufacture' all branches of industry with the exceptions of fishing, hunting, mining and such industries as have for their object to obtain possession of material products in the state in which they are fashioned by nature. He says that the term is generally applied only to those departments of industry in which the raw material is fashioned into desirable articles by art or labour without the aid of the soil; but that there is no real good reason for such limitation, and that it is obvious from the slightest consideration that agriculture is nothing but a manufacture, for the business of the agriculturist is so to dispose of the soil, seed, manure or other materials, that they may supply him with other and more desirable products. Brande's Encyclopædia, tit. 'Manufacture.' The etymological or scientific meaning of words is useful in the construction of statutes, and sometimes is decisive. A gas company is a manufacturing company. *Nassau Gas-light Co. v. City of Brooklyn*, 89 N. Y. 409. An aqueduct company is not a manufacturing company. *Dudley v. Jamaica Pond Aqueduct Co.*, 100 Mass. 183. Nor is a mining company. *Byers v. Franklin Coal Co.*, 106 id. 131. The reason for this distinction is apparent. Illuminating gas is an artificial and not a natural product, produced by the modification of natural substances by art and industry. A company engaged in producing gas is a manufacturing company in its strictest sense. A water company or a mining company manufactures nothing. Such a company applies labour and machinery simply in obtaining and making merchandise of natural products without any change of substance. Its business has none of the qualities of a manufacturing business. But the technical or scientific meaning of words does not always control in the construction of statutes. The cardinal rule in the construction of legislative acts is that words in common use are to be taken

WHAT IS A MANUFACTURER?

in their ordinary signification. In *Parker v. Great Western Railway Co.*, 6 E. & B. 77, the charter of a railway company which authorized the company to charge a certain rate 'for all cotton and other wools, drugs and manufactured articles,' was under consideration. The Court held that the term 'manufactured articles,' must be understood in its popular sense; that it did not mean all articles produced from the raw state by manual skill and labour, but those articles only which are made in what are, in popular language, called manufactories. To call a farmer, who cultivates his land and reaps and markets his crops, a manufacturer—as he is in the scientific signification of the term—would do violence to language in the construction of a statute, and yet the owner who cuts down the trees which are the growth of his land, and prepares from them lumber for sale in the market, and engages in it as a business is, in a popular sense, and therefore in a legal sense, a manufacturer. Such a person was held to be a manufacturer within the meaning of the Bankrupt Act. In *re Chandler*, 1 Lowell, 478. . . . The Federal Court in the Territory of Utah in 1872, decided that the publishers of a daily newspaper, who also conducted in connection therewith a book and job printing office, in which are manufactured cards, notes, bill heads, blank books, posters, show bills, etc., were manufacturers within the meaning of the Bankrupt Act. In *re Kenyon & Fenton*, 6 Nat. Bank. Reg. 238. In a later case, decided in 1877, the Supreme Court of the District of Columbia decided that the publisher of a weekly newspaper was not a manufacturer within the meaning of the Bankrupt Act. In *re Capital Publishing Co.*, 18 Nat. Bank. Reg. 319. In the last case referred to, *In re Kenyon & Fenton* was cited and commented on. It was there observed that in the earlier case the decision was placed upon the ground that the bankrupts were manufacturers of books, bill heads, etc., and it was declared that in that respect they were undoubtedly manufacturers within the meaning of the Act. This observation was well founded, and all that was necessary to the decision of the territorial Court was that the parties were in fact engaged in some business which made their transactions amenable to the bankrupt law. The rest of the

opinion was *obiter dictum*, and was disapproved. We agree with the reasoning and with the conclusion of the Court in *In re Capital Publishing Co.*, that the publisher of a newspaper is not, in a legal sense, a manufacturer. It is true that in the production of his papers, which he sells, he employs manual labour and mechanical skill. But so does the sculptor who produces, as the result of his handiwork and genius, the statue; so does the painter who executes his painting with his palette and his brush; so does the lawyer who prepares his brief, or the author who writes a book. But neither the sculptor nor the painter is classified as a manufacturer by reason of his works; nor would the lawyer or the author be regarded as a manufacturer though they employed a printer—the former to print his brief, and the latter his book. In the ordinary and general use of the word, 'manufacturer,' the publishing of a newspaper does not come within the popular meaning of the term. As was said by the Court in the case last cited, no definition of the word 'manufacturer' has ever included the publisher of a newspaper, and the common understanding of mankind excludes it. . . . It gives employment to printing presses, types and editors, and yet in the whole history of newspapers from the close of the seventeenth century, this word 'manufacturer' has never been applied to them, or appropriated by them in the whole range of English literature. No author has ever so used it, and it is never so applied by any statute or any authority except by way of opinion in the solitary case from Utah. A newspaper has intrinsically no value above that of the unprinted sheet. Indeed, it has less value, considered intrinsically, as a mere article of merchandise. Its value to its subscribers arises from the information it contains, and its profit to the publisher is derived, in a great measure, from the advertising patronage it obtains by reason of the circulation of the paper, induced by the enterprise and ability with which it is conducted. Neither in the nature of things nor in the ordinary signification of language, would a newspaper be called a manufactured article or its publisher a manufacturer." But on the other branch, "both the cases cited from the Federal Courts agree that a person engaged in

RE ANDREWS —RECENT ENGLISH PRACTICE CASES.

such a business is a manufacturer in a legal sense. And in *Seeley v. Gwillim*, 40 Conn. 106, it was held that a person who carried on the business of a book-binder and making blank books was a manufacturer. In this view we concur. A person who is engaged in such a business would be appropriately denominated a manufacturer in the popular sense of that term, and he would fall within that designation in its scientific sense, for by his skill and labour he adds to the intrinsic value of the materials used, which gives them a merchantable value in the market as merchandise." See *Browne's Common Words and Phrases*, tit. "Manufacturer." —*Albany Law Journal*.

REPORTS.

ONTARIO.

(Reported for the CANADA LAW JOURNAL.)

LIFE INSURANCE CASE.

RE ANDREWS.

Trustees for infants—Insurance moneys—Security—
47 Vict. ch. 20.

Application upon petition for the appointment of a trustee under 47 Vict. c. 20 sec. 12, and amendment, to receive the shares of infants under a life policy. The petition set out that letters of guardianship had been issued to the petitioner, one A. S. Wilcox, by the proper Court of Dakota, U. S., and affidavits filed showing his fitness.

Held, upon satisfactory evidence being furnished that the petitioner had given substantial security on his appointment as guardian in Dakota according to the practice of that Court, that he must be considered he was a fit and proper person to be appointed trustee for the purpose of receiving the shares of the infants herein without giving further security.

[Ferguson, J., Sept. 5, 1885.]

Geo. Andrews was insured by a policy in Canada Life Assurance Company. The policy was subsequently endorsed in favour of his children, two being minors. He died intestate without appointing any trustee to receive their shares. The company admitted the claim and paid the shares of the adult children, and the guardian of the children, who resided in Neche, Dakota, petitioned for the appointment of a trustee under sec. 12 of 47 Vict. c. 20,

C. L. Ferguson, for the petitioner. The infants are willing that their guardian should be appointed trustee; he has given proper security in the foreign Court and should not now be required to give security here, which it would be impossible to do. This is distinguishable from *re Thin*, 10 Prac. R. 490, where no security was given. Petitioner is entitled to his costs: 47 Vict. c. 20 sec. 15.

W. F. Burton (Hamilton), for the insurance company. The very object of the statute is to enable the company to pay and discharge the claim by paying to a trustee appointed by this Court. It appears that there is "no one competent in this Province" to receive the shares of the infants. The order should provide that payment to the trustee shall be a sufficient discharge to the company.

FERGUSON, J., directed an order to issue appointing the guardian trustee on satisfactory evidence being furnished that he had given substantial security in Dakota, according to the practice of that Court, without further security being given here. This being done, it was ordered that payment to the trustee should discharge the company; costs to both parties out of the fund.

ENGLAND.

RECENT PRACTICE CASES.

RAWSTONE V. PRESTON.

Production—Shorthand notes—Transcript.

The corporation of P. having taken land of R. compulsorily, at an arbitration to ascertain the sum to be paid to R. therefor, R. claimed a right of way over other land, and such alleged right had to be considered in fixing the price. At the arbitration R. employed a shorthand writer to take notes of the evidence and arguments, and afterwards had them transcribed. Subsequently he brought an action to compel the P. corporation to remove material which they had put on the land over which he had claimed the right of way. The relevancy of the notes was admitted, but R. objected to produce the transcript, on the ground that it was privileged, as the notes were taken at R.'s expense, and in anticipation of the proceedings.

Held, that the transcript was not privileged.

[30 Chy. D. 116.]

KAY, J. . . . "When the facts are stated it must be seen at once that the transcript does not come within any of the cases of privilege, the principles of which are recognized, and I therefore order the production of the transcript, but I will reserve the costs of the motion until the trial of the action."

Q.B. Div.]

NOTES OF CANADIAN CASES.

[Q. B. Div.]

DYKE V. STEPHENS.

Production—Infant—Next friend.

The Court refused either to order the next friend of an infant plaintiff to make an affidavit as to documents or stay the action till he made such affidavit.

Higginson v. Hall, 10 Ch. D. 235, dissented from.

[30 Chy. D. 189.

PEARSON, J. . . . "The next friend is not a party to the action, he is just there simply to protect the interest of the infant, and to show that the interest is of such nature that he is willing to guarantee costs, and in making himself liable for costs he is in no way a party to the action, and I have no jurisdiction to make an order on him as if he were a party. Mr. Wilkinson asks that an order may be made staying the action, unless the plaintiff's next friend makes an affidavit as to documents. . . . To do so would be to make the rights and interests of the infant depend on the conduct of the next friend; that is what the Court never does." Speaking of the case of *Higginson v. Hall*, 10 Ch. D. 235, the learned judge said: "All I have to remark on in that case is that counsel for the lunatic consented, and almost invited the order, and I cannot help thinking that if the case had been properly argued the Vice-Chancellor would have seen that the order ought not to have been made."

NOTES OF CANADIAN CASES.

PUBLISHED IN ADVANCE BY ORDER OF THE
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QUEEN'S BENCH DIVISION.

Wilson, C. J.]

MAY V. ONTARIO AND QUEBEC RY. CO.

Railway company—Negligence—Railway employee—Common employment—Dominion Railway Act, 42 Vict. ch. 9 s. 27 (D.)—*Limitation of action*—"By reason of the railway."

The statement of claim alleged that the plaintiff was employed by the defendants to work at track laying; that while so employed the defendants directed and required him to assist in bringing railway supplies to the place where they were being used; that they also

directed and required him to be carried, as part of his employment, on the defendants' trains; that accordingly he was received by the defendants "to be safely carried" on a train; and that owing to the defendants' negligence he was, while so travelling, thrown off the train and injured.

Held, (1) That if the plaintiff accepted a different employment from that originally contemplated he became the defendants' workman in that new employment, just as he had been in his former employment.

(2) That the statement that the plaintiff was received on the train "to be safely carried" did not imply that a special bargain was made "to safely carry," but only that the plaintiff was to be safely carried as one of their workmen in the course of his employment, and that there was no cause of action.

The defendants set up that the injuries complained of happened more than six months before the action brought, and that the action was barred by the 27th section of the Consolidated Railway Act, to which the plaintiff demurred.

Held, that any damage done through negligence upon a railway in the carriage of passengers and the like is damage done "by reason of the railway": *Brown v. Brockville and Ottawa Railway Co.*, 20 U. C. R. 202; *McCallam v. G. T. Ry. Co.*, 31 U. C. R. 527; and *Kelly v. Ottawa Street Ry.*, 3 A. R. 616, referred to and followed.

Seemle, that the concluding words of the 27th section of the Consolidated Railway Act, viz., that "the defendants may prove that the same (that is the damage) was done in pursuance of the authority of this Act and the special Act," should be read as meaning "in the course and prosecution of their business as a railway company, constituted in pursuance of," etc.

F. E. Hodgins, for demurrer.

R. M. Wells, contra.

Q. B. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div.]

Wilson, C. J.]

LONDON AND CANADA LOAN AND AGENCY
CO. V. MORPHY ET AL.*Sequestration—What exigible thereunder—Member's seat on stock exchange.*

The plaintiffs, having recovered a judgment against the defendants for a large sum, obtained an order from a judge in chambers ordering defendants to pay the amount due upon such judgment to the sheriff, to whom executions had issued against defendants' goods, or to the plaintiffs, by a day certain, and in default that a writ of sequestration should issue. Default having been made, a writ of sequestration issued accordingly.

Held, that though the writ could not have issued to enforce the judgment, which was for the payment of money, without limiting a time certain, yet that the judge's order was a judgment, for disobedience of which the writ might issue, and that the writ was regularly issued.

Defendants were members of the Toronto Stock Exchange (a corporation), and had seats at the stock board thereof, shown to be of considerable value, and to be saleable by the defendants on compliance by them with certain by-laws of the corporation, which, among other things, provided for a written application to the Exchange by any member wishing to sell his seat for leave to sell, submitting at the same time the name of the proposed purchaser; and if the purchaser was in such a case acceptable, or had theretofore been accepted, the leave would be granted. A party desiring to become a member of the Stock Exchange could not, under the by-laws, be admitted a member of the Exchange, unless he has been previously an attorney to a broker, member of the Exchange, for six months in Toronto, and had, upon his own application, been accepted by the Exchange as a member; the vote for his acceptance to be by ballot, and four black balls to exclude. After being accepted he might purchase a seat from some one already a member, or pay an entrance fee of \$4,000 to the Exchange, and by such payment make a seat for himself. The total number of seats to be at the board was limited to forty, whereof thirty-three were taken up by the thirty-three members of the Exchange at

the present time. The sequestrator having applied for an order under this writ of sequestration to sell the defendants' seats at the Exchange,

Held, that such seats were the property of the debtors, and should be saleable under process; that the Court could implement its execution by ordering the defendants to do any act necessary to effect, or to refrain from any act to obstruct, a sale of the same seats, and would do so; but that, inasmuch as the Court could not control the exercise of the ballot by the members of the Exchange, no effectual order for sale of the seats could be made.

Semble, that this was a failure of justice, and that there should be legislation to extend the operation of the writ of sequestration to meet such cases; and the application was therefore refused without costs.

Arnoldi, for plaintiffs.

Geo. Morphy, contra.

CHANCERY DIVISION.

Ferguson, J.]

[September 5.]

IN RE ANDREWS AND THE CANADA LIFE
ASSURANCE COMPANY.

Life insurance—Payment of claim to guardian appointed by foreign Court—47 Vict. cap. 20, sec. 15 (O.).

A guardian of infants appointed by the Probate Court of the Territory of Dakota, U.S.A., petitioned for payment to him of certain money to which the infants were entitled, under a policy of insurance issued by the Canada Life Assurance Company, instead of having the money paid into Court as provided by 47 Vict. cap. 20, sec. 15. The company did not object to pay the money over as prayed, provided such payment would be a discharge to them under the Act. *Re Thin*, 10 P. R. 490, was cited.

Held, that inasmuch as it was satisfactorily shown to the Court that the foreign guardian had already given proper and sufficient security to the satisfaction of the Court appointing him, the order might go for payment over of the amount due less the company's costs of the

Chan. Div.]

NOTES OF CANADIAN CASES.

[Chan. Div

application, and discharging the company from all further liability.

C. L. Ferguson, for the petition.

W. F. Burton, for the company.

[A fuller report of this case will be found on p. 428, *ante*.]

Boyd, C.]

[October 30.]

IN RE THE QUEEN CITY REFINING COMPANY OF TORONTO (LIMITED).

Winding up proceedings—Contributories—Stockholders by subscription or allotment—R. S. O. c. 150.

In the winding up proceedings of the Q. C. R. Co. the Master placed the subscribers to the stock-book upon the list of contributories. The contributories appealed upon the ground that although they were subscribers for stock, still no stock had ever been allotted to them by the directors.

Held, that the Master was right, that the contract signed was an unqualified taking of shares, and that the Act R. S. O. c. 150, contemplates two modes of acquiring stock, one by subscription and the other by allotment.

A. Hoskin, Q.C., and Foster, Q.C., for the appeal.

S. H. Blake, Q.C., and Meyer, contra.

Proudfoot, J.]

• [November 11.]

ROBERTSON V. PATTERSON.

Agreement to give covenant to build—Refusal to execute—Specific performance.

In an agreement for the sale of land from R. to P., the terms were inserted in these words: "price \$1,000, \$200 cash and balance in five yearly payments, interest at seven per cent., and covenant of P. to build houses worth not less than \$4,000, to be commenced in a year from date, and finally completed in two years . . ." The \$200 was paid down, and R.'s solicitor prepared and tendered the deeds (in which was inserted a covenant to build) and the mortgage to P. for execution. P. refused to execute them, and R. brought an action for specific performance, which P. defended on the ground that the covenant to

build was too vague, and would not be enforced by the Court.

Held, that the plaintiff was clearly entitled to the performance of the defendant's agreement to give a covenant to build houses of a certain value within a specified time.

Wood v. Silcock, 50 L. T. N. S. 251, distinguished.

Moss, Q.C., for the plaintiff.

S. H. Blake, Q.C., and Wilson, for the defendant.

Divisional Court.]

[December 3.]

MORRISON V. MORRISON.

Will—Construction of—R. S. O. cap. 106, sec. 26—Devise of after acquired realty—"Contrary intention."

The will of D. M., dated 19th May, 1873, contained the following devise:—"I give and bequeath to my brother, Robert Morrison, \$500, and the property on Hughson Street. I give, devise and bequeath all the rest and residue of my estate, real, personal and mixed, which I shall be entitled to at the time of my decease, to my nephew, Alexander Morrison." The testator died 8th March, 1883. At the time of making the will the testator was possessed of one property on Hughson Street, which was known as the Red Lion Hotel, but he subsequently acquired, and owned at the date of his death, other properties on the same street, but unconnected with the hotel and upon the opposite side of the street. The action was brought to determine whether, upon a true construction of the will, the subsequently acquired properties passed under the devise of "the property on Hughson Street," or under the residuary devise.

Held, affirming the decision of Boyd, C. (Proudfoot, J., dissenting), that the residuary clause conveyed all property acquired by the testator subsequent to the date of the will, and that a "contrary intention" was sufficiently displayed by the will to render the statute inapplicable.

James Parkes, for defendant Robert Morrison.

E. Martin, Q.C., Waddell and Furlong, for other parties.

Chan. Div.]

NOTES OF CANADIAN CASES.

[Prac.

Divisional Court.]

[December 12.]

CLOSE v. THE EXCHANGE BANK.

Interpleader—Jurisdiction of Divisional Court—Appeal from order of County Court—Interpleader Act, 44 Vict. cap. 7 (O.)—Marginal Rule 2. O. J. Act.

Upon a writ of execution issued out of this Division to the sheriff of the County of York, a seizure was made of goods which were subsequently claimed by a third party. The sheriff thereupon applied for and obtained an interpleader order upon an affidavit which stated the nature of the goods seized and taken in execution, and that their value was less than four hundred dollars; and the order thereupon directed the issue to be tried in the County Court of the County of York. The issue was tried without a jury and a verdict entered for the plaintiff by the Judge of the County Court. The defendant thereupon appealed to the Divisional Court from the decision of the Judge. No motion was made to strike the cause off the list, but upon the appeal coming on to be argued a preliminary objection was taken by the respondent (plaintiff), that the appeal should have been to the Court of Appeal, and not to this Court, inasmuch as the procedure was governed by the Interpleader Act, under which the interpleader order was made, and this Court had no jurisdiction to entertain the appeal.

Held (1), that Rule 2 of the O. J. Act establishes a code of practice and procedure for all cases of interpleader, whereby interpleading procedure in all branches of the High Court is assimilated, superseding any variant or inconsistent practice theretofore existing; (2) that this Rule 2 is to be so read and applied as to regulate the proceedings in all matters of interpleader, which are to be conducted under R. S. O. cap. 54, as extended by the statute 44 Vict. cap. 7 (O.); (3) That inasmuch as the affidavit filed by the sheriff stated the value of the property seized to be under \$400, as well as its nature, it was clearly to be intended that the interpleader order was made under the statute, rather than under the old practice of the former Court of Chancery; (4) That the statute provides that the appeal should be to the Court of Appeal; and that the Divisional Court has no jurisdiction.

Barker v. Leeson, 9 P. R. 107, distinguished, and cause struck out; but without costs (following *Wansley v. Smallwood*, 10 P. R. 233), as the objection was taken at the hearing for the first time.

Semble, that the jurisdiction of the old Court of Chancery in matters of interpleader is now practically obsolete, being superseded by the remedy provided by statute.

Bain, Q.C., for the appellants.

Shepley, for the respondent.

PRACTICE.

Wilson, C.J.]

[October 30.]

ALEXANDER v. SCHOOL TRUSTEES OF GLOUCESTER.

Party and party costs—Taxation—Items in bill.

Upon appeal from the taxation of the plaintiff's costs of the action, as against the defendant, by the Deputy Clerk of the Crown at Ottawa;

Held, (1) A fee settling plaintiff's reply to counterclaim should have been allowed.

(2) The costs of a similitur with jury notice were properly disallowed, on the ground that the notice might have been served with one of pleadings.

(3) Instructions for examination of plaintiff, \$2, should have been allowed, where the defendants were examining the plaintiff for discovery.

(4) Instructions for examination of defendant by plaintiff, \$2, should have been allowed.

(5) Attendance to bespeak copies of plaintiff's and defendants' depositions on examinations for discovery should have been allowed.

(6) The plaintiff was not bound to rely on admissions made by the defendants on their examination for discovery before trial, and therefore, should have been allowed the costs of subpoenaing a witness to prove a fact then admitted.

(7) A fee for attending to hear judgment should have been allowed for each attendance, where judgment was twice deferred by the judge.

(8) The discretion of the taxing officer as to counsel fee at the trial should not be interfered with.

[Prac.]

NOTES OF CANADIAN CASES.

[Prac.]

(9) Where the judge at the trial directed the plaintiff to put in writing, before judgment should be delivered, reasons why the judgment should be in his favour, charges for drawing, engrossing, and settling reasons should have been allowed.

(10) A telegram to defendant's solicitors advising them of the result of the judgment when delivered, sent by direction of the judge, should have been allowed.

(11) Instructions for affidavit of disbursements were properly disallowed, as it was not a special affidavit.

(12) Witness fees for fourteen days attendance at the trial should have been allowed, as, where there is no peremptory list, it is necessary to keep the witnesses in attendance from the first day of the assizes till the case is reached.

Holman, for the appeal.

Alan Cassels, contra.

Boyd, C.]

[November 30.]

McCALLUM v. McCALLUM.

Taxation—Local registrar—Certificate—Notice of appeal—Counsel fees—Instructions.

Where no formal certificate of the result of a taxation between party and party of the costs of the action by a local registrar was filed, but where the bill of costs, with a memo. at the end showing the result of the taxation, signed by the registrar, was filed in the local office and forwarded to Toronto for the purposes of an appeal, and where it was admitted that execution had been issued upon such memo.

Held, that the absence from the files of a more formal certificate should not bar the appeal.

Two clear days' notice of such appeal is sufficient.

A counsel fee of \$5 for each necessary and proper enlargement of a Court motion should be taxed.

Where charges for a brief are allowed, instructions for brief should also be allowed.

Holman, for the appeal.

Douglas Armour, contra.

Osler, J. A.]

[Dec. 5.]

KELLY v. THE IMPERIAL LOAN CO.

Security for costs of appeal—Distribution of fund ratably amongst parties entitled.

This was an application made on behalf of the Imperial Loan and Investment Company for payment out of certain moneys in Court under the following circumstances:

The plaintiff, on appealing from the judgment of the Court of Appeal for Ontario (11 Ap. R. 526) to the Supreme Court of Canada, deposited the usual sum of \$500 by way of security. The above company and William Damer were the defendants.

The plaintiff's appeal was dismissed with costs on Nov. 16th, 1885.

The above company's costs in the Supreme Court were taxed at \$257.70, and Damer's costs were taxed at \$300.85.

Brown, for the company, contended that where there are two separate respondents the security in Court must be regarded as applicable in equal portions, half for one respondent and half for the other.

A. C. Galt, for the respondent Damer, argued that the amount in Court should be apportioned amongst respondents in proportion to the costs taxed, and referred to the following authorities by way of analogy, in administration proceedings: *Thompson v. Cooper*, 2 Collyer 87; *Holmsted's Orders*, Vol. I. p. 284; *Snell's Equity*, pp. 40 and 41.

On Dec. 14th his lordship gave judgment, holding that the fund should be apportioned according to the amounts taxed, so that the deficiency might be borne ratably by both respondents.

OSGOODE HALL LIBRARY.

Divisional Court.]

[December 12.]

CLOSE V. EXCHANGE BANK.

Interpleader issue—County Court—Appeal—Divisional Court—Court of Appeal—44 Vict. ch. 7 sec. 1 (O.).

An interpleader order made in an action in the High Court of Justice, Chancery Division, directed the trial of an issue in a County Court pursuant to 44 Vict. ch. 7 sec. 1 (O.).

Held, that an appeal did not lie from the judgment of the County Court upon the issue to the Chancery Divisional Court, but to the Court of Appeal..

Shepley, for the plaintiff.

Bain, Q.C., for the defendants.

OSGOODE HALL LIBRARY.

The following is a list of books, new and old, received at the Library during the months of June, July and August, 1885:

Stephen's Quebec Law Digest. Montreal, 1882.
 Patrick's Election Reports. Toronto, 1851.
 Wicksteed's "In Memoriam, Sir G. E. Cartier." Chitty's Archbold, 14th ed. London, 1885.
 Stephen's Nat. Biography, vols. 1 and 2. London, 1885.
 Daniel's Chy. Forms, 4th ed. London, 1885.
 Broom's Constitutional Law, 2nd ed. London, 1885.
 Story's Equity Jurisprudence, 1st Eng. ed. London, 1884.
 Stephen's Digest of Evidence, 4th ed. London, 1881.
 Lowndes' Marine Insurance, 2nd ed. London, 1885.
 Daniel's History of Law Reports. London, 1884.
 Monckton's Metaphysical Aspect of Nature. London, 1885.
 Annual Register. London, 1885.
 Lilly's Modern Entries or Select Pleadings. London, 1791.
 Woddeson's Lectures. London, 1792.
 Wells on Questions of Law and Fact. New York, 1876.
 Hall's Jurisdiction of the Lords. London, 1796.
 Laperriere's Speaker's Decisions. Ottawa, 1872.
 Macgregor's Letters Patent. London, 1856.
 Harris' Hints on Advocacy. St. Louis, 1881.
 Brandt's Gaming Laws. London, 1873.
 Round's Law of Domicile. London, 1861.
 Civil Code of Louisiana. N. Orleans. 1838.
 Creasy's Constitutions of British Empire. London, 1872.
 Roper on Husband and Wife. Philad., 1841.
 Tomlin's Digest (Criminal). New York, 1823.
 Petersdorf on Bail. London, 1824.
 Collier's Law of Contributories. London, 1875.
 Clifford on Elections. London, 1802.
 New Brunswick Sup. Ct. Reports. St. John, 1885.

Albany Law Journal, vol. 31. Albany, 1885.
 Law Times—Law and Lawyers, vol. 78. London, 1885.
 Nova Scotia, Sup. Ct. Reports, vol. 4. Halifax, 1885.
 Geological Survey—Report of Progress. Montreal, 1885.

The following were received at Osgoode Hall Library during the months of September, October and November, 1885.

Crim. Laws of Canada, 1769-1881. Ottawa, 1881.
 U. S. Patent Office Gazette, vol. 30. Washington, 1885.
 Quebec Statutes 48 Vict. Quebec, 1885.
 Central Law Journal, vol. 20. St. Louis, 1885.
 Federal Reporter, vol. 23. St. Paul, 1885.
 P. E. Island Statutes. Charlottetown, 1885.
 N. Brunswick Statutes, 1885. Fredericton, 1885.
 B. C. Statutes, 1885. Victoria, B. C., 1885.
 Encyclopedia Britannica, vols. 1-19.
 Wiltie on Mortgage Foreclosures. Rochester, N.Y., 1885.
 Kelly's French Law of Marriage. New York, 1885.
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